DOCKET

No. 87-1882-CFX
Status: GRANTED

Title: Dean Neitzke, etc., et al., Petitioners
v.
Harry Lawrence Williams, Sr.

Docketed:
May 12, 1988

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Spear,Robert S.

Counsel for respondent: Williams Sr.,Harry L.,
Rutherglen,George A.

Entry	Date	Note	Proceedings and Orders
1	May 12 1988	G	Petition for writ of certiorari filed.
2	Jun 21 1988		DISTRIBUTED. September 26, 1988
3	Jul 25 1988	P	Response requested -- JPS. (Due August 24, 1988)
4	Aug 18 1988	X	Brief of respondent Harry Lawrence Williams, Sr. in opposition filed.
5	Aug 18 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Oct 3 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
7	Oct 3 1988		Petition GRANTED.
			**********
8	Oct 17 1988	G	Motion of respondent for appointment of counsel filed.
9	Oct 18 1988		DISTRIBUTED. October 28, 1988. (Motion of respondent for appointment of counsel),
11	Oct 31 1988		REDISTRIBUTED. Nov. 4, 1988. (Motion of respondent for appointment of counsel).
12	Nov 7 1988		Motion for appointment of counsel GRANTED and it is ordered that George A. Rutherglen, Esquire, of Charlottesville, Virginia, is appointed to serve as counsel for the respondent in this case.
13	Nov 10 1988		Record filed.
		*	Certified copy of C. A. Proceedings received.
14	Nov 17 1988		Record filed.
		*	Certified copy of original record received.
18	Nov 17 1988		Brief of petitioners Dean Neitzke, etc., et al. filed.
15	Nov 21 1988	D	Motion of respondent to dismiss the writ of certiorari as improvidently granted filed.
16	Nov 28 1988	X	Brief of petitioners opposing respondent's suggestion of mootness and motion to dismiss the writ as improvidently granted filed.
17	Nov 28 1988		DISTRIBUTED. Dec. 2, 1988. (Motion of suggestion of mootness and motion to dismiss).
19	Dec 5 1988		DISTRIBUTED. Dec. 9, 1988. (Suggestion of mootnes and motion to dismiss the writ of certiorari as improvidently granted).
20	Dec 12 1988		Motion of respondent to dismiss the writ of certiorari as improvidently granted DENIED. Respondent's suggestion of mootness is rejected. Justice Brennan OUT.
22	Dec 14 1988		Brief of respondent filed.
21	Dec 16 1988		Joint appendix filed.
25	Jan 6 1989		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 22, 1989. (4TH

No. 87-1882-CFX

Entry	Date	Note	Proceedings and Orders
			CASE.)
23	Jan 10 1989		CIRCULATED.
24	Jan 12 1989	X	Reply brief of petitioners Dean Neitzke, et al. filed.
26	Feb 22 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87 1882

Supreme Court, U.S.
FILED
MAY 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

October Term 1987

DEAN NEITZKE, Individually and in his official capacity as Administrator of the Infirmary, Indiana Reformatory, and DR. HAN CHUL CHOI, Individually and in his official capacity as Medical Director, Indiana State Reformatory,

Petitioners,

vs.

HARRY LAWRENCE WILLIAMS, SR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a case that fails to state a claim under Federal Rules of Civil Procedure 12(b)(6) automatically meets the "frivolous" standard under 28 U.S.C. § 1915(d). The Seventh Circuit here held it does not. This is contrary to the rule in the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Eleventh Circuit Courts of Appeals.

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DEAN NEITZKE, Individually and in his official capacity as Administrator of the Infirmary, Indiana Reformatory, and DR. HAN CHUL CHOI, Individually and in his official capacity as Medical Director, Indiana State Reformatory,

Petitioners,

vs.

HARRY LAWRENCE WILLIAMS, SR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners respectfully pray that the Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) entered in Cause Number 87-1417 on January 12, 1988, which reversed and remanded this case to the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter District Court).

OPINIONS BELOW

The decision of the Seventh Circuit was issued on January 12, 1988. A copy of that opinion has been included in the Appendix at page A-1. The Seventh Circuit denied Petitioners' Petition for Rehearing on February 12, 1988. A copy of that order has been included in the Appendix at page A-11.

The decision of the District Court issued on January 16, 1987 which dismissed Respondent's complaint can be found in the Appendix at page A-13. The decision of the District Court issued March 11, 1987 which dismissed Respondent's amended complaint can be found in the Appendix at page A-23.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 17 of this Court.

The Seventh Circuit's decision was entered on January 12, 1988 and the Seventh Circuit's order denying Petitioners' Petition for Rehearing was entered on February 12, 1988. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c) and Rule 20.2.

LIST OF PARTIES

The Plaintiff-Respondent, Harry Lawrence Williams, Sr. is an inmate incarcerated at the Indiana State Reformatory.

The Defendants-Petitioners include Dean Neitzke, the Administrator of the Infirmary at the Indiana Reformatory, and Dr. Han Chul Choi, the Medical Director at the Indiana State Reformatory.

The District Court's dismissal of all other Defendants was affirmed by the United States Court of Appeals for the Seventh Circuit. These individuals include Gordon H. Faulkner, Commissioner of the Indiana Department of Correction, Edward L. Cohn, Superintendent of the Indiana State Reformatory, and

Craig A. Hanks, Assistant Superintendent of the Indiana State Reformatory.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1915 provides:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes an affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.
>
> (b) Upon the filing of an affidavit in accordance with subsection (1) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.
>
> (c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.
>
> (d) The court may request an attorney to represent any such person unable to employ counsel and may dis-

miss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

STATEMENT OF THE CASE

A. Nature of the Case

This Petition arises from a reversal and remand for further proceedings by the Seventh Circuit. This cause concerns a civil rights action filed by an inmate who is confined at the Indiana State Reformatory and who alleged that the medical treatment provided him constituted a violation of the cruel and unusual punishment clause of the Eighth Amendment.

B. Course of Proceedings

This action was initiated on November 7, 1986 when Williams filed his application to proceed *in forma pauperis* and the complaint he proposed to file pursuant to 42 U.S.C. § 1983. On January 16, 1987, the District Court entered an order which found that Williams' tendered complaint failed to state a claim under 42 U.S.C. § 1983. Therefore, his claims were deemed frivolous within the meaning of 28 U.S.C. 1915(d) and leave to proceed *in forma pauperis* was denied and the complaint dismissed.

On January 28, 1987, Williams filed a motion to vacate judgment and motion to amend information. On March 11, 1987, the District Court reaffirmed its order of January 16, 1987 and once again found that Williams' complaint was frivolous and failed to state a cognizable claim pursuant to 42 U.S.C. § 1983.

On January 12, 1988, the Seventh Circuit reversed the District Court and remanded the cause for further proceedings. The Seventh Circuit agreed with the District Court by finding

that the complaint failed to state a claim upon which relief could be granted, but reversed the denial of pauper status by holding a complaint which fails to state a claim is not necessarily frivolous within the meaning of 28 U.S.C. § 1915. Neitzke and Choi's Petition for Rehearing was denied on February 12, 1988.

C. Facts Material to the Consideration of the Question Presented

The question presented herein is purely legal. Both the District Court and the Seventh Circuit found that Respondent's complaint failed to state a claim upon which relief could be granted pursuant to 42 U.S.C. § 1983. The only issue raised is whether such a complaint is necessarily frivolous pursuant to 28 U.S.C. § 1915(d).

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit has Erroneously Decided that a *Pro Se* Complaint which Fails to State a Claim Upon which Relief can be Granted is not as a Matter of Law Frivolous within the Meaning of 28 U.S.C. § 1915(d)

The Fifth Circuit has instructed their district courts to do exactly what the Seventh Circuit is prohibiting in this case. In *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), the Court of Appeals concluded that "the standard for determining the legal sufficiency of a complaint is the same under either Fed. R. Civ. P. 12 or 28 § U.S.C. 1915(d)." *Id.*, at 182. The Fifth Circuit then instructed their district courts as follows:

> We must take advantage of every tool in our judicial workshop. The district courts should use with greater frequency the device of referring prisoners' cases to magistrates for § 1915 determination and for Rule 12(b)(6) review of specific claims. To do so will not be adverse to meritorious prisoners' claims. To the contrary, limited judicial resources might then be utilized more timely and more efficaciously to resolve those cases in which relief should be granted.

Id., at 182. *Accord, Green v. McKaskle*, 788 F.2d 116 (5th Cir.

1986); *Coy v. Estelle*, 789 F.2d 318 (5th Cir. 1986); *Montana v. Commissioners Court*, 659 F.2d 19 (5th Cir. 1981).

In *Harris v. Menendez*, 817 F.2d 737 (11th Cir. 1987), the Eleventh Circuit expanded a determination by the Fourth Circuit which held that the standard for determining whether a suit is frivolous is the same as that for dismissing a case under Rule 12(b)(6). The Eleventh Circuit stated:

> We note that some circuits have overlooked the reasons for the liberal grant of discretion in IFP cases and have held that the standard for determining when a suit is "frivolous" is the same as that for dismissal of a case under Fed. R. Civ. P. 12(b)(6). *See e.g.*, *Boyce v. Alizaduh*, 595 F.2d 948, 951-51 (4th Cir. 1979). This circuit, however, has not merged the two standards, specifically holding that a court's authority to dismiss a complaint as frivolous under section 1915(d) is broader than dismissal under Fed. R. Civil. P. 12. *Montana v. Commissioners Court*, 659 F.2d 17, 21 (5th Cir. 1981), *cert. denied*, 455 U.S. 1026, 102 S.Ct. 1730, 72 L.Ed.2d 147 (1982).

Id., at 741-742.

The Ninth Circuit has held that one of the grounds upon which a complaint may be dismissed as frivolous is "when the complaint fails to state a claim according to Fed. R. Civ. P. 12(b)(6)." *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984) citing *Boag v. Boies*, 455 F.2d 467 (9th Cir. 1972), *cert. denied*, 408 U.S. 926, 92 S.Ct. 2509, 33 L.Ed.2d 388 (1977). In *Anderson v. Coughlin*, 700 F.2d 37, 43 (2nd Cir. 1983), the Second Circuit not only approved the notion that the Rule 12(b)(6) standard is a basis for dismissal pursuant to § 1915(d), it instructed their district courts to expand the § 1915 standard beyond the 12(b)(6) standard. Therefore, a complaint could be dismissed even if it stated a claim upon which relief could be granted. Other circuits also agree that a complaint is frivolous pursuant to § 1915(d) if it fails to meet the standards set out in Rule 12(b)(6). *See Malone v. Colyer*, 710 F.2d 258, 261 (6th Cir. 1983); *Martin-Trigona v. Stewart*, 691 F.2d 856, 858 (8th Cir. 1982); *United States ex rel. Walker v. Fayette County, Pennsylvania*, 599 F.2d 573 (3rd Cir. 1979).

The Seventh Circuit has now adopted the conclusion of the D.C. Circuit (*See Brandon v. District of Columbia Board of Parole*, 734 F.2d 56 (D.C. Cir. 1984)) and found that the fact that a *pro se*, *in forma pauperis* complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6) does not, in and of itself, warrant the *sua sponte* dismissal of a case as frivolous under § 1915(d). (See Appendix, p. A-6). Such a conclusion is clearly erroneous.

In the instant case, the District Court dismissed the original complaint and then allowed an amendment to the complaint. Both the District Court and the Seventh Circuit concluded that the amended complaint failed to allege sufficient facts to state a claim. (See Appendix, p. A-7). Therefore, there can be no rational argument in law or in fact to support Respondent's claim and requiring the District Court to grant pauper status serves no purpose. Such action should not be required until sufficient facts are alleged to state a cognizable claim. Such a limitation would not work to the detriment of a *pro se* plaintiff in view of the District Court's liberal attitude toward the allowance of amendments to the complaint as demonstrated by the District Court's action in this case.

In *Jones v. Morris*, 777 F.2d 1277 (7th Cir. 1985), the court made the following observations with regard to *pro se* litigation:

> . . . , that section ([S 1915) embodies a delicate balance between access to the courts and the need to curb the abuses necessarily associated with *in forma pauperis* litigation. On the one hand, the right to proceed *in forma pauperis* ensures that a indigent litigant has meaningful access to the federal justice system. At the same time, though, the Congress has recognized that the litigant who takes advantage of this manner of proceeding, unlike his nonindigent counterpart, is not subject to the same economic disincentives to filing frivolous, malicious or repetitive lawsuits. . . . These improperly taken suits can clog the courts and reduce the capacity of the entire system to deal effectively with truly meritorious claims.

Id., at 1279. In *Green v. McKaskle*, 788 F.2d 116 (5th Cir. 1986), the court rendered similar observations as follows:

> Unlike most litigants, prisoners have everything to gain and nothing to lose by filing frivolous lawsuits. Filing a suit *in forma pauperis* costs a prisoner little or nothing; time is usually of little importance to a prisoner and prisoners are not often deterred by the threat of possible sanctions for malicious or frivolous actions or perjury. Moreover, a prisoner, while he may be unsuccessful, can at least look to a "short sabbatical in the nearest federal courthouse." *Cruz v. Beto*, 405 U.S. 319, 327, 92 S.Ct. 1079, 1084, 31 L.Ed.2d 263, 271 (1972) (Rehnquist, J., dissenting). Thus, the temptation to file frivolous or malicious suits is strong, and these suits clutter up the federal courts, wasting scarce and valuable resources, subjecting prison officials unnecessarily to the burdens of prison litigation and preventing prisoner suits with merit from receiving adequate attention.

Id., at 1119-1120.

With these objectives in mind, Petitioners conclude that the purposes and intent of § 1915(d) are not fulfilled by requiring a District Court to grant pauper status and file a complaint which fails to state a claim. To do so would only require a defendant to file a 12(b)(6) motion and obtain a dismissal. In this case, upon remand, the defendants would file a motion to dismiss and the District Court would be required to dismiss the action in view of the findings of the Seventh Circuit that the complaint failed to state a claim which would survive a Rule 12(b)(6) motion. Such a waste of judicial resources should not be permitted.

Furthermore, Petitioners submit that the actions taken by the District Court herein should be encouraged. Identical conduct by district courts in other circuits is required. The District Court herein reviewed the complaint pursuant to § 1915(d), found that no claim had been stated and issued a memorandum explaining its decision. Once informed of the deficiencies in the complaint, the *pro se* Plaintiff was allowed an

opportunity to amend and still failed to state a claim. *In forma pauperis* status is a privilege, not a right. To extend this privilege to litigants who cannot state a valid claim only abuses this privilege to the detriment of the courts, other *pro se* litigants with valid claims and all possible defendants and their attorneys. The District Court's decision was proper and should be affirmed by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Appendix

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-1417

HARRY LAWRENCE WILLIAMS, SR.,

Plaintiff-Appellant,

v.

GORDON H. FAULKNER, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP 86 1307 C—**Sarah Evans Barker**, *Judge*.

SUBMITTED NOVEMBER 17, 1987*—DECIDED JANUARY 12, 1988

Before BAUER, *Chief Judge*, and COFFEY and FLAUM, *Circuit Judges*.

FLAUM, *Circuit Judge*. Harry Lawrence Williams, Sr. appeals from the district court's order dismissing his *pro se* complaint as frivolous, pursuant to 28 U.S.C. § 1915(d), and denying him leave to proceed *in forma pauperis*. For

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* After a preliminary examination of the briefs filed in this appeal, the court notified the parties that it had tentatively concluded that oral argument would not be helpful. This notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). None of the parties filed such a statement, and therefore the appeal was submitted on the briefs and record.

the reasons stated below, we affirm in part, reverse in part, and remand to the district court for further proceedings.

I.

Plaintiff-appellant Harry Williams, Sr. is an inmate in the custody of the Indiana Department of Corrections. A doctor at the Indiana State Prison diagnosed Williams as having a small brain tumor which affects his equilibrium. Because of this condition, the prison doctor placed Williams on "medical idle status" for one year, and noted that "it is very likely that he will have this condition for some time to come."

Upon his transfer to the Indiana State Reformatory on October 18, 1985, Williams notified the Reformatory's medical staff about his brain tumor and the prison doctor's recommendation that he remain on "medical idle status." In his complaint, Williams alleged that on several occasions he asked to be seen by the doctor at the Reformatory for treatment of his tumor. He further alleged that although he was examined several times during the following year, the Reformatory doctors refused to treat Williams for his brain tumor. Williams was also forced to work in the Reformatory's garment manufacturing industry despite the prison doctor's recommended work restriction. In October of 1986, one year after his transfer to the Reformatory, Williams' equilibrium problems worsened; as a result, he refused to continue working in the Reformatory's garment manufacturing industry. The Reformatory Conduct Adjustment Board disciplined Williams for his refusal to work by transferring him to a less desirable cellhouse.

Williams filed a *pro se* complaint alleging that various Indiana state prison officials violated his rights under the eighth and fourteenth amendments by denying him medical treatment and transferring him to a less desirable cellhouse without due process in violation of 42 U.S.C. § 1983. In addition to his complaint, Williams filed a motion to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). The district court dismissed Williams' complaint *sua sponte* under 28 U.S.C. § 1915(d),[1] finding the complaint frivolous because it failed to state a claim upon which relief could be granted. The district court also denied Williams leave to proceed *in forma pauperis*.[2]

In response, Williams filed a motion to vacate the court's judgment and a motion which the district court construed to be a motion to amend his complaint. The district court held that Williams' amended complaint still failed to state a claim upon which relief could be granted and was therefore frivolous within the meaning of 28 U.S.C. § 1915(d); the court affirmed its previous order dismissing Williams' complaint *sua sponte*. Williams filed a timely notice of appeal.

Because we conclude that the district court applied an incorrect standard for determining when a *sua sponte* dismissal of a *pro se* complaint is appropriate under 28 U.S.C. § 1915(d), we reverse its judgment in part and remand for further proceedings. Even under the appropriate *sua sponte* dismissal standard, however, Williams' due process claim is clearly frivolous. We therefore affirm that part of the district court's judgment dismissing Williams' due process claim.

---

[1] The statute provides, in relevant part, that "[t]he court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d).

[2] The district court's denial of Williams' motion to proceed *in forma pauperis* was consistent with the procedure outlined in *Wartman v. Branch 7, Civil Division, County Court*, 510 F.2d 130, 132-34 (7th Cir. 1975). In *Wartman*, this court stated that a district court may deny a motion to proceed *in forma pauperis* if it finds that the complaint is frivolous. Other circuits, however, grant or deny *in forma pauperis* status based on the plaintiff's financial resources alone and then independently determine whether to dismiss the complaint as frivolous. *See, e.g., Franklin v. Murphy*, 745 F.2d 1221, 1226-27 n.5 (9th Cir. 1984); *Boyce v. Alizaduh*, 595 F.2d 948, 950-51 (4th Cir. 1979).

II.

A.

To ensure that indigents have access to the courts, Congress enacted 28 U.S.C. § 1915[3] which established a system for *in forma pauperis* litigation. Congress recognized, however, the danger that without the monetary disincentives to filing suit, the federal courts could be opened to a flood of spurious litigation. *Jones v. Morris*, 777 F.2d 1277, 1278-79 (7th Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986); *Brandon v. District of Columbia Board of Parole*, 734 F.2d 56, 59 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985). To address these competing concerns, Congress gave district courts the authority to dismiss frivolous or malicious *in forma pauperis* complaints. 28 U.S.C. § 1915(d); *Jones*, 777 F.2d at 1279. A district court's discretion to dismiss *pro se*, *in forma pauperis* complaints, however, is limited "in every case by the language of the statute itself which restricts its application to complaints found to be frivolous or malicious." *Jones*, 777 F.2d at 1279 (*quoting Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir. 1985)). A frivolous complaint is one in which "the petitioner can make no rational argument in law or facts to support his [or her] claim for relief." *Jones*, 777 F.2d at 1279-80 (*quoting Corgain v. Miller*, 708 F.2d 1241, 1247 (7th Cir. 1983)); *see also Brandon*, 734 F.2d at 59 (a frivolous *pro se* complaint is one where "there is indisputedly absent any factual and legal basis for the asserted wrong.").

[3] 28 U.S.C. § 1915(a) provides:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs of security therefore, by a person who makes affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

B.

The district court dismissed Williams' complaint because it failed to state a claim upon which relief could be granted; the court thereby equated the dismissal standards of Rule 12(b)(6) and § 1915(d). This case therefore raises the question of whether our established test for the *sua sponte* dismissal of frivolous *pro se*, *in forma pauperis* complaints under 28 U.S.C. § 1915(d) differs in any respect from the test for the dismissal of a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[4] Rule 12(b)(6) permits the dismissal of a complaint for failure to state a claim upon which relief can be granted only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 42 (1957); *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985). Under § 1915(d), in contrast, an *in forma pauperis*, *pro se* complaint can be dismissed *sua sponte* by the district court only if the petitioner cannot make any rational argument in law or fact which would entitle him or her to relief. Thus, the § 1915(d) test is less stringent than the Rule 12(b)(6) dismissal standard. The fact that a *pro se*, *in forma pauperis* complaint fails to state a claim upon which relief could be granted under Rule 12(b)(6) does not, in and of itself, warrant the *sua sponte* dismissal of the case as frivolous under § 1915(d).[5]

[4] Rule 12(b)(6) provides in pertinent part:

> Every defense, in law or fact, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> . . . .
>
> (6) failure to state a claim upon which relief can be granted
>
> . . . .

Fed. R. Civ. P. 12(b)(6).

[5] There are, however, situations where a complaint both fails to state a claim upon which relief can be granted pursuant to 12(b)(6)

(Footnote continued on following page)

In the limited circumstance of *pro se, in forma pauperis* litigation, *sua sponte* dismissal is appropriate only if the complaint is frivolous or malicious within the meaning of § 1915(d).

Our holding that the test for dismissal under § 1915(d) is not the same as the test for a 12(b)(6) dismissal, is in accord with the United States Court of Appeals for the District of Columbia Circuit's decision in *Brandon*, 734 F.2d 56. The *Brandon* court held that "a complaint need not indisputably state a cause of action to survive *sua sponte* dismissal; instead, if the complaint has at least *an arguable* basis in law and fact—if the complaint is *viable*—it cannot be deemed frivolous." *Id.* at 59 (emphasis in the original). The *Brandon* court's focus, as well as our own, is on a district court's *sua sponte* dismissal of a *pro se, in forma pauperis* complaint.

Although our decision today does not alter our previous standard for frivolity—where the petitioner can make no rational argument in law or fact to support his or her claim for relief—we emphasize that this threshold determination, when made without the benefit of defendant's pleadings, must be more lenient than the determination to dismiss a complaint under 12(b)(6). A *pro se, in forma pauperis* complaint should not be dismissed *sua sponte* as frivolous unless there is "indisputably absent any factual or legal basis for the asserted wrong." *Brandon*, 734 F.2d at 59. In a close case, the court should permit the claim to proceed at least to the point where responsive pleadings are required. *Jones*, 777 F.2d at 1281. This rule should actually reduce the work of the federal courts by preventing, through premature dismissal, the creation of appeals based on incomplete records. *Id.* at 1280.

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[5] *continued*

and is frivolous within the meaning of § 1915(d). One common example is a case in which it is clear that the defendants are immune from suit. *See, e.g., Williams v. Goldsmith*, 701 F.2d 603 (7th Cir. 1982) (all defendants absolutely immune).

III.

Applying the proper standard for a *sua sponte* dismissal of a *pro se, in forma pauperis* complaint, we conclude that the district court prematurely dismissed Williams' eighth amendment claim. At this stage of the proceedings, we must consider all of the documents Williams filed in support of his claim and accept his allegations as true. *See Matzker v. Herr*, 748 F.2d 1142, 1148 n.5 (7th Cir. 1984). Williams alleged in his complaint that he was diagnosed as having a brain tumor that affects his equilibrium; that the defendant Dr. Choi was aware of his condition; that Dr. Choi did not give Williams any treatment for the tumor,[6] thereby endangering his life; and that he was forced to work in the Reformatory garment manufacturing industry despite the recommendation of the prison doctor that he be placed on medical idle status.

We agree with the district court that Williams' eighth amendment allegations fail to demonstrate the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6). *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976), *reh. denied*, 429 U.S. 1066 (1977); *Campbell v. Greer*, No. 86-2256, slip op. at 3-4 (7th Cir. Sept. 9, 1987); *Shockley v. Jones*, 823 F.2d 1068, 1072 (7th Cir. 1987); *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 71 (1986). Williams' complaint, however, is not frivolous within the meaning of 28 U.S.C. § 1915(d) because we cannot state with certainty that Williams is unable to make any rational argument in law or fact to support his claim for relief. Because

---

[6] Appellees' counsel argues on appeal that Williams' own submissions to the court establish that in fact he has been treated for the brain tumor. They point to a "Notice of Tort Claim," attached to Williams' complaint, where Williams states that Dr. Choi treated him for "a seizure disorder." We cannot definitively conclude, however, that the seizure disorder was a result of, or in any way related to, the brain tumor. In any event, we must accept Williams' allegations as true at this stage of the proceedings.

Williams' eighth amendment claim was not frivolous as to some of the defendants, the district court should have required those defendants to answer the complaint.

Williams specifically alleged that Dr. Choi refused to treat his brain tumor even though Williams informed him of its existence; this allegation is sufficient to demonstrate Dr. Choi's responsibility for the alleged eighth amendment violation. Additionally, at the pleading stage we can presume that defendant Nietzke, in his role as Administrator of the Infirmary, was responsible to ensure that Williams received adequate medical care. We therefore can infer Nietzke's personal involvement in the alleged misconduct for the purpose of evaluating the district court's dismissal of Williams' complaint. *See Duncan v. Duckworth*, 644 F.2d 653, 655 (7th Cir. 1981). We hold, therefore, that as to defendants Choi and Nietzke, the district court improperly dismissed Williams' eighth amendment claim and we reverse and remand to the district court for further proceedings.

As to defendants Hank, Cohn, and Faulkner, however, we agree that the complaint should be dismissed as frivolous. Williams alleged no personal involvement on their part, and their positions as Assistant Superintendent (Hanks), Superintendent of the Indiana State Reformatory (Cohn), and as Commissioner of the Indiana Department of Corrections (Faulkner) do not justify any inference of personal involvement in the alleged deprivation of medical care. *Id.* at 656; *Boyce v. Alizaduh*, 595 F.2d 948, 953 (4th Cir. 1979). Recovery against these three defendants cannot be imposed vicariously on a theory of *respondeat superior*. *See Duncan*, 644 F.2d at 655; *Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971). We therefore conclude that the complaint was properly dismissed as frivolous as to these three defendants because Williams cannot make any rational argument in law or fact to support his claim for relief against them.

IV.

In his complaint, Williams also alleged that his due process rights under the fourteenth amendment were violated when he was transferred, without a classification hearing, from one cellhouse to another because he refused to work. The district court concluded that Williams had not alleged any deprivations of liberty or property as a result of his transfer and, in any event, that he had no constitutionally protected right to remain in any particular wing of the institution. The district court therefore held that Williams' fifth amendment claim failed to state a claim upon which relief could be granted and *sua sponte* dismissed that count of the complaint. The relevant inquiry, however, is whether or not Williams can make any rational argument in law or fact to support this claim. Because Williams' due process claim cannot meet this test, it was properly dismissed *sua sponte*.

Prisoners have no constitutionally protected liberty interest in remaining in any particular wing of a prison. *Hanvey v. Pinto*, 441 F.2d 1154, 1155 (3rd Cir. 1971). *See also Hewitt v. Helms*, 459 U.S. 460, 468 (1983) (no liberty interest in remaining in prison's general population); *Meachum v. Fano*, 427 U.S. 215, 224-25, *reh. denied*, 429 U.S. 873 (1976) (no liberty interest in remaining in a particular institution within state system); *Shango v. Jurich*, 681 F.2d 1091, 1098 (7th Cir. 1982) (same); *Corgain v. Miller*, 708 F.2d 1241, 1252 (7th Cir. 1983) (no liberty interest in remaining in state, as opposed to federal, custody). Absent some statutory or regulatory provision that clearly limits prison officials in the exercise of their discretion, a prisoner may be transferred for any reason, or for no reason at all.[7] *Shango*, 681 F.2d at 1100. Williams

[7] A well-established exception to this broad grant of discretion is that prison officials may not transfer a prisoner in retaliation for his exercise of a constitutionally protected right. *Shango*, 681 F.2d at 1098 n.13; *Buise v. Hudkins*, 584 F.2d 223, 229 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979). Williams has not, however, alleged any facts that suggest that his transfer was in retaliation for the exercise of a constitutionally protected right.

has not relied on any Indiana statute or regulation limiting the prison officials' discretion to transfer him to a different cellhouse. Because we are not aware of any such limitation, we hold that Williams cannot make any rational argument in law or fact to support his due process claim. We therefore affirm the district court's *sua sponte* dismissal of Williams' due process claim.

V.

For the foregoing reasons, the district court's order dismissing *sua sponte* Williams' *pro se* complaint and denying him leave to proceed *in forma pauperis* is affirmed in part and reversed in part. This case is remanded to the district court for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—1-12-88—475

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 12, 1988.

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge

HENPY LAWRENCE WILLIAMS, SR., *Plaintiff-Appellant*,	)	
No. 87-1417	)	
v.	)	
GORDON H. FAULKNER, Individually and in his Official Capacity as Commissioner, Indiana Department of Correction; EDWARD L. COHN, Individually and in his Official Capacity as Superintendent, Indiana State Reformator; CRAIG A. HANKS, Individually and in his Official Capacity as Assistant Superintendent, Indiana State Reformatory; DEAN NEITZKE, Individually and in his Official Capacity as Administratory of the Infirmary, Indiana State Reformatory; and DR. HAN CHUL CHOI, Individually and in his Official Capacity as Medical Director, Indiana State Reformatory.	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 86-1307-C Sarah Evans Barker, *Judge*.
Defendants-Appellees.	)	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants-appellees on January 26, 1988, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS SR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. IP 86-1307-C
	)	
GORDON H. FAULKNER, Individually and in his Official Capacity as Commissioner, Indiana Department of Correction; EDWARD L. COHN, Individually and in his Official Capacity as Superintendent, Indiana State Reformatory; CRAIG A. HANKS, Individually and in his Official Capacity as Assistant Superintendent of Operations, Indiana State Reformatory, DEAN NEITZKE, Individually and in his Official Capacity as Administrator of the Infirmary, Indiana State Reformatory; and DR. HAN CHUL CHOI, Individually and in his Official Capacity as Medical Director, Indiana State Reformatory,	)	

Defendants.

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H. I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by way of his complaint and that said complaint is hereby DISMISSED.

Dated this 16th day of January, 1987.

/s/ _____
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS SR.,)
)
Plaintiff,)
)
vs.)
)
GORDON H. FAULKNER,)
Individually and in his Official)
Capacity as Commissioner, Indiana) Cause No. IP 86-1307-C
Department of Correction;)
EDWARD L. COHN, Individually)
and in his Official Capacity as)
Superintendent, Indiana State)
Reformatory; CRAIG A. HANKS,)
Individually and in his Official)
Capacity as Assistant)
Superintendent of Operations,)
Indiana State Reformatory, DEAN)
NEITZKE, Individually and in his)
Official Capacity as Administrator)
of the Infirmary, Indiana State)
Reformatory; and DR. HAN CHUL)
CHOI, Individually and in his)
Official Capacity as Medical)
Director, Indiana State)
Reformatory,)

Defendants.

ENTRY

This matter is before the Court upon the application of Harry Lawrence Williams for leave to proceed in forma pauperis on a tendered civil rights complaint as amended brought pursuant to 42 U.S.C. § 1983. Plaintiff has no credit in his inmate trust account and is thus presumptively eligible to proceed as a

pauper. However, an examination of the tendered complaint reveals that the movant has failed to state a cognizable claim upon which relief can be granted against the named defendants. Movant's claims are thus frivolous and must be dismissed pursuant to 28 U.S.C. § 1915(d).

Movant is presently confined at the Indiana State Reformatory in Pendleton, Indiana. Movant makes essentially two claims: first, that the defendants failed to provide plaintiff with proper medical treatment in violation of the eighth amendment and second, that the defendants violated plaintiff's due process rights by subjecting him to a disciplinary action and otherwise transferring him without a due process hearing. Plaintiff seeks a declaratory judgment, preliminary and permanent injunction, compensatory and punitive damages, costs and any other proper relief.

This Court is mindful of its duty to liberally construe *pro se* pleadings drafted by prisoners. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972). In determining the sufficiency of the tendered complaint we have given the movant "the benefit of the doubt." *McKeever v. Israel*, 689 F.2d 1315, 1322 (7th Cir. 1982). Nonetheless, even with this liberality accorded movant, the Court finds that his allegations are vague and conclusory and will not suffice to state a claim upon which relief can be granted.

Inadequate Medical Treatment

When a state imposes imprisonment as a punishment for crime, it accepts the obligation to provide persons in its custody with a medical care system that meets minimal standards of adequacy. This obligation is enforceable in federal court, as inadequate medical care for prisoners violates the eighth amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *id.* at 116 n. 13 ("denial of medical care is surely not part of the punishment which civilized nations may impose for crime.") (Stevens, Jr., dissenting). "When systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hestiate to use its injunctive powers." *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977)

(Kaufman, C.J.) The policy of deferring to the judgment of prison officials in matters of prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts. *Id.* at 54. *Compare Bell v. Wolfish*, 441 U.S. 520, 551 n. 32 (1979) (deferring to prison officials' judgment on means to control smuggling of money, drugs and weapons into prison).

With respect to medical care, plaintiffs can establish an eighth amendment violation only if they can prove that there has been a "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. at 104. "It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id.* at 106. As a practical matter, "deliberate indifference" can be evidenced by "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" or it can be demonstrated by "proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted), *cert. denied*, 450 U.S. 1041 (1981). *See also Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977); *Wellman v. Faulkner*, 715 F.2d 269, 271-72 (7th Cir. 1983). As the Supreme Court noted in *Estelle*, however, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 105-06.

Plaintiff claims that he had "a small tumor in the pinal [sic] region of the brain" when he was transferred to the reformatory. Plaintiff allegedly told the medical staff this and the staff took no action. Plaintiff claims he subsequently complained of dizziness, which the staff also disregarded. Plaintiff states that his condition worsened and he was taken to the infirmary and given a blood test. After receiving the results from the blood test, the medical staff released plaintiff back into the general population. Plaintiff states he had informed the staff that he had been medically authorized to be placed in idle status due to the brain tumor affecting his equilibrium, but

was nonetheless given a work assignment. Plaintiff states that infirmary records show he was checked for the brain tumor on September 11, 1986, but he denies this occurred on that date and furthermore that the office lacks the requisite equipment for such a test. Plaintiff also states that defendant Dr. Choi was practicing medicine without a license during this period.

Plaintiff has failed to satisfy the *Estelle* standard in that he has failed to bring forth facts indicating a deliberate indifference to a serious medical need has occurred. Plaintiff has not alleged that his tumor is the type which is properly treated with surgery or other active medical procedure, nor has he alleged that his work assignment caused him any serious physical injury. While plaintiff does state that the prison administrators did not follow the medical recommendation that plaintiff be placed in idle status, plaintiff has not alleged a sufficiently egregious injury to give rise to what has been termed a "constitutional tort", actionable under the substantive aspect of the due process clause. *See Williams v. Kelly*, 624 F.2d 695 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981); *Ellsworth v. Mockler*, 554 F. Supp. 1072 (N.D. Ind. 1983); *Ricketts v. Derello*, 574 F. Supp. 645 (E.D. Pa. 1983). Plaintiff's proper avenue for relief is through the prison administrative procedures, or in state court under a tort claim.

Plaintiff's final claim based on his medical treatment is that his treatment was performed and supervised by someone practicing medicine without a license, defendant doctor Han Chul Choi. A call to the Indiana Medical Licensing Board reveals Dr. Choi's true medical history. In October of 1984, Dr. Choi's state license to dispense controlled substances expired. Although his federal license was still valid, Indiana law requires physicians to possess both state and federal licenses. As a result of a subsequent investigation, Dr. Choi's license to practice medicine was suspended from August 30, 1986 to September 5, 1986. The investigation apparently revealed no serious improprieties, and the brief suspension was based solely upon the procedural irregularity of Dr. Choi's state license expiration (Dr. Choi refiled for the state license the day after being

formally notified of its expiration). As the relevant medical treatment took place prior to the suspension, no constitutional liability may be found to arise from Dr. Choi's brief absence from the practice of medicine.

Transfer

On October 23, 1986, plaintiff was transferred from "J" cellhouse, the honor cellhouse, to "G" cellhouse and placed on holdover status. Plaintiff claims that this transfer was the result of his not working and, because he allegedly was denied a classification hearing, has occurred in violation of his due process rights.

An inmate has no constitutionally protected right to be incarcerated in a particular institution. *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 681 F.2d 1091 (7th Cir. 1982). Thus, the transfer of inmates from one prison to another is generally considered to be a matter within the internal administration of the prison. *Loebath v. Civiletti*, 516 F. Supp. 73 (S.D. Ind. 1980). It is similarly permissible to freely transfer prisoners from one wing of an institution to another. *Harvey v. Pinto*, 441 F.2d 1154 (3rd Cir. 1971). Plaintiff has not alleged any accompanying deprivations of liberty or property resulting from the transfer; only that he is on hold status in his new cellhouse. Plaintiff has not alleged that the hold status is a result of his failure to work. Instead, it appears that plaintiff is on hold status while a place is being found for him in "G" cellhouse. Therefore, plaintiff has not alleged any facts indicating that his due process rights were violated by the transfer.

Accordingly, the Court finds that the tendered complaint fails to state a claim under 42 U.S.C. § 1983. As a result, plaintiff's claims are frivolous within the meaning of 28 U.S.C. § 1915(d) and leave to proceed in forma pauperis is DENIED and the accompanying complaint DISMISSED.

IT IS SO ORDERED.

Dated this 16th day of January, 1987.

/s/ Sarah Evans Barker

SARAH EVANS BARKER,
Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HENRY LAWRENCE WILLIAMS, SR., *Plaintiff,*	)	
	)	CAUSE NO.
VS.	)	
	)	IP 86-1307-C
GORDON H. FAULKNER, Individually and in his Official Capacity as Commissioner, Indiana Department of Correction; EDWARD L. COHN, Individually and in his Official Capacity as Superintendent, Indiana State Reformatory; CRAIG A. HANKS, Individually and in his Official Capacity as Assistant Superintendent of Operations, Indiana State Reformatory; DEAN NEITZKE, Individually and in his Official Capacity as Administrator of the Infirmary, Indiana State Reformatory; and DR. HAN CHUL CHOI, Individually and in his Official Capacity as Medical Director, Indiana State Reformatory.	)	
Defendants.	)	

ENTRY

This matter is before the Court on the motion of Harry L. Williams Sr. to vacate judgment with attached memorandum of law filed pursuant to the provisions of Rule 59(e). Fed. R. Civ. P. and a "motion to amend information" which the Court elects to treat as a second amendment to the tendered complaint.

The "amendment" deals with matters unrelated and subsequent to the events described in the first amended complaint and adds nothing to the Court's analysis of the issues presented therein.

The Court has reviewed its entry of January 16, 1987, which denied leave to proceed in forma pauperis on the tendered complaint, Mr. Williams made two assertions of unconstitutional conduct by his custodians: 1) that he received inadequate medical treatment by untrained technicians and an unlicensed medical doctor; and 2) that he was subjected to a disciplinary action and was transferred from the honor cellhouse without a due process hearing.

The Court also notes that upon review of the file a motion for appointment of counsel had been tendered by Mr. Williams as part of the motion to proceed in forma pauperis. Since the entry fails to address this motion, the Court does so at this time.

Under the doctrine of *Brown-bey v. United States*, 720 F.2d 467 (7th Cir. 1983) the appointment of counsel issue must be addressed prior to a decision on the merits. The Court must consider the criteria as delineated in *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981). The first of these criteria and the most significant is the plaintiff's ultimate success on the merits. For the reasons set forth in the decision of January 16, 1987, and hereinafter, the movant's chances of success are insubstantial and his motion for appointment of counsel must be DENIED.

The plaintiff's tendered complaint concerns his medical treatment and the results of his abandonment of his job in the prison industries.

The leading case involving a prisoner petition concerning inadequate medical care is *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). In *Estelle*, the plaintiff received a back injury while on his prison work assignment. He was examined and sent back to work, but later he was re-examined, prescribed a pain killer, and allowed to remain in his cell. Over the next three (3) months he was seen by medical personnel seventeen (17) times and treated for his back injury,

high blood pressure, and heart problems. On several occasions, however, his requests to be taken to the infirmary were refused by guards, and he was kept in administrative segregation, apparently for refusal to work. On one occasion his prescription for pain pills went unfilled for a four-day period because pharmacy staff lost it. No x-ray was taken of the plaintiff's back and certain other appropriate tests were not conducted. The Supreme Court found that the plaintiff's complaint was insufficient to state a claim against the prison medical director. The Court stated that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment,' " 429 U.S. at 104-105. The Court then elaborated this standard as follows:

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician had been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.

429 U.S. at 105-06. *See also Penn v. Starks*, 275 F. Supp. 1240, 1243 (N.D. Ind. 1983) and cases cited therein.

Both *Estelle* and *Penn* are factually similar to the case at bar and the holdings in those cases are dispositive here. In both those cases, as here, the plaintiffs received medical treatment on several occasions. The plaintiff here, like the plaintiffs in *Estelle* and *Penn*, complains of the type or quality of medical care, and such a complaint does not arise to the level of deliberate indifference resulting in the wanton infliction of pain required for a deprivation of constitutional rights.

The Court again concludes that the tendered amended complaint fails to state a § 1983 action or any other constitutional action and the Court must, therefore, deny relief.

Since the motion originally filed with designated as one under Rule 59(e) and since the motion has been denied, the Court, pursuant to the rule delineated in *Averhart v. Arrendondo*, 773 F.2d 919 (7th Cir. 1985)) and *Muhammad v. DeRobertis*, 788 F.2d 1268 (7th Cir. 1986) now notifies the movant that if he wishes to appeal either from this order or from the original judgment a new notice of appeal must be filed in accordance with the provisions of Rule 4(a)(4), Fed. R. App. P.

Dated this 11th day of March, 1987.

/s/ Sarah Evans Barker

SARAH EVANS BARKER,
Judge
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OPPOSITION

BRIEF

NO. 87-1882

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

DEAN NEITZKE AND DR. HAN CHUL CHOI,

PETITIONERS

VS.

HARRY LAWRENCE WILLIAMS, SR.,

RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Harry Lawrence Williams, Sr., respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case. That opinion is reported at 837 F. 2d 304.

QUESTION PRESENTED

Whether a case that fails to state a claim under Federal Rules of Civil Procedure 12(b)(6) automatically meets the "frivolous" standard under 28 U.S.C. § 1915(d). The Seventh Circuit here held it does nto.

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STATEMENT OF THE CASE

Harry Lawrence Williams, Sr. filed a civil action in the United States District Court for the Southern District of Indiana at Indianapolis, against the Defendants and others alledging violations of his rights to recieve adequate medical attention and due process classification hearings. The United States District Court (hereinafter The Court) denied Williams' motion to proceed in forma pauperis and dismissed the case, Williams timely filed his motion to vacate judgment and when such motion was denied Williams timely filed his notice of appeal. When the matter was heard in the Seventh Circuit Court of Appeals (hereinafter Seventh Circuit) several of the Defendants were dismissed and the case remanded to The Court for further proceedings on Williams Eighth Amendment claims. The Defendants then filed their Suggestion For Rehearing HnBanc in the Seventh Circuit which was denied on the 12th day of February, 1988.

The Court filed the case thereby requiring the Defendants to respond in twenty (20) days which the Defendants failed to comply with. The Court issued its Pre-Trial Scheduling Order and the Defendants have hindered the discovery process as they have failed to provide the discovery materials to the Respondent. Seventh Circuit held that Williams complaint, however, is not frivolous within the meaning of 28 U.S.C. § 1915(d) because we cannot state with certainty that Williams is unable to make any rational argument in law or fact to support his claim for relief. Williams v. Faulkner, 837 F. 2d 304 (7th Cir. 1988).

SUMMARY OF ARGUMENT

This case is not worthy of consideration by this Court under Rule 17. Contrary to the Rule 17 bases cited by the Petitioners, the Seventh Circuit applied settled principles of federal constitutional law to unambiguous dismissals in Indiana Courts.

The Petitioners pose the primary issue as being whether a case that fails to state a claim under Federal Rules of Civil Procedure 12(b)(6) automatically meets the "frivolous" standard under 28 U.S.C. § 1915(d). Since 1972, it has been clear that allegations of pro-se complaints are held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 520, 92 S. Ct. 594 (1972); Corby v. Conboy, 457 F. 2d 251 (2d Cir. 1972); Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 286, rehearing den. 429 U.S. 1066, 429 S. Ct. 798 (1977); United States ex rel Walker v. Fayette Cty. Pa., 599 F. 2d 573 (1979).

It is clear that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Edwards v. Duncan, 355 F. 2d 993 (1966); Malone v. Colyer, 710 F. 2d 258 (1983); Montana v. Commissioners Court, 659 F. 2d 19 (5th Cir. 1981).

The Third Circuit Court of Appeals stated that while a specific intent to deprive a person of his constitutional rights is required under criminal sections of the civil rights statute, neither specific intent nor purpose to deprive an individual of his civil rights is a prerequsite to civil liability under the civil provisions of the statute. Basista v. Weir, 340 F. 2d 74 (1965); This Court of Appeals also stated that on appeal from district court's dismissal based solely on the pleadings, Court of Appeals must take all of well-pleaded allegations of complaint as true and construe complaint liberally in light most favorable to plaintiff. Jennings v. Shuman, 567 F. 2d 1213 (1977)

SUMMARY OF ARGUMENT

The Court of Appeals for the Seventh Circuit stated that inmate's pro-se complaint alleging violation of his Eighth (8th) Amendment rights was not subject to dismissal under 28 U.S.C. § 1915(d), which allows dismissal of in forma pauperis profeedings that are either frivolous or malicious, where complaint alleged not only that inmate's fall was due to various prison officials' failing to exercise reasonable care, but that officals' acted with reckless or careless disregard or indifference to inmate's rights and safety. Jones v. Morris, 777 F. 2d 1277 (7th Cir. 1985).

The Court of Appeals for the Second Circuit stated that a constitutional claim is stated when prison officals intentionally deny access to medical care or interfere with prescribed treatment. Todaro v. Ward, 565 F. 2d 48 (2d Cir. 1977). The Seventh Circuit stated that because we cannot state with certainty that Williams is unable to make any rational arguement in law or fact to support his claim for relief his case is not frivolous within the meaning of 28 U.S.C. § 1915(d). Decree Williams v. Faulkner, 837 F. 2d 304.

Federal Rules of Civil Procedure, Rule 8(a) clearly states that a pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, unless the Court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) A short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. Rannels v. S.E. Nichols, Inc., 591 F. 2d 242 (1979); Federal Rules of Civil Procedure, Rule 8(a).

SUMMARY OF ARGUEMENT

Despite earlier comments to the contrary, see, for example, In re Kemmler, 136 U.S. 436, 10 S. Ct. 930, 34 L? Ed. 519 (1890); O'Neil v. Vermont, 144 U.S. 323,332, 12 S. Ct. 693, 36 L. Ed. 450 (1892); and Collins v. Johnston, 237 U.S. 502, 510-511, 35 S. Ct. 649, 59 L. Ed. 1071 (1915), the Eighth Amendment's guarantee against the infliction of cruel and unusual punishments seems now to have come to be regarded as directly applicable to the states through the due process clause of the Fourteenth Amendment. Jackson v. Bishop, 404 F. 2d 571 at 576.

ARGUEMENT

I. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER A CASE THAT FAILS TO STATE A CLAIM UNDER FEDERAL RULES OF CIVIL PROCEDURE 12 (B)(6) AUTOMATICALLY MEETS THE "FRIVOLOUS" STANDARD UNDER 28 U.S.C. § 1915(D).

This case exemplifies what can happen when the Constitution of the United States has been misinterpreted as in the case at bar. The Petitioners seem to feel that the Respondent, due to his incaroeration has lose all of his Constitutional rights and this is not the case, for as this Court stated in Haines v. Kerner, 404 U.S. 520, 92 S. Ct. 594 (1972), whatever may be the limits on the scope of inquiry of Courts into the administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro-se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); See also, Dioguardi v. Durning, 139 F. 2d 774 (CA2 1944).

The Court of Appeals for the Second Circuit stated that in the instant case we are called upon to decide, as have other Courts in recent years, whether several important aspects of a correctional institution's overall health care system meets constitutional requirements. We agree with the able District Judge that they do not. While the Physician staff and physica; facilities at the Bedford Hills Correctional Facility may be adequate, all to often an inmate in need of treatment has been denied access to medical help by aebitrary procedures and misadministration so gross that it must be deemed willful. Faced with this deliberate denial of basic health care, we have little difficulty affirming the moderate remedial measures ordered by the District Court. Todaro v. Ward, 565 F. 2d at 50.

ARGUEMENT I CONT.

That the Court of Appeals for the 11th Circuit stated that to protect prisoners' access to federal Courts, pro-se complaints are liberally construed, and lay pleader is not held to the more rigorous standard for formal pleadings prepared by Attorneys. Phillips v. Mashburn, 746 F. 2d 782 (11th Cir. 1984).

The Respondent is considered to be a lay pleader within the means of the law, and the Petitioners would have this Court to believe otherwise. The Court of Appeals went on to state that to determine sufficiency of a complaint for purposes of statute providing that in forma pauperis proceeding may be dismissed sua sponte by Court if allegation of poverty is untrue, or if satisified that action is frivolous or malicious. Complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Phillips v. Mashburn, 746 F. 2d at 784.

The Seventh Circuit stated in a case prior to the case at bar that Corts should proceed cauticualy in making Eighth (8th) Amendment judgment for, unless the Supreme Court reverse it, decision that a given punishment is not permitted under the Eighth (8th) Amendment cannot be reversed short of a Constitutional amendment so that revisions cannot be made in light of further experience. Soto v. Dickey, 744 F. 2d 1266 (7th Cir. 1984).

The Petitioners argue that the Respondents' claim failed to state a claim which would entitle him to the relief sought by his claim, yet; the Seventh Circuit stated in a case prior to the case at bar that although prison inmate's complaint was inadequate to state a claim when scrutinized with a highly technical eye, where additional papers filed by parties raised serious factual disputes, District Court, rather than attempting to resolve case on motion for summary judgment, should have appointed counsel to assist pro se litigant, thereby insuring not only meritorious claims of civil rights pro se plaintiff were not defeated, but to ease burdens placed on District Court and Court of Appeals when plaintiff has filed inartfully drawn and arguably incomplete complaint. Stringer v. Rowe, 616 F. 2d (7th Cir, 1980) at 1001.

ARGUEMENT CONT

The Court of Appeals held in several cases before them that where State prison did not provide basic emergency medical service, much less any assurance of more complete medical treatment when necessary, District Court would be directed to hold additional hearings and to delineate, within specific terms and time limitations, not only an overall long range plan for improvement of facilities at the prison but an immediate plan to update all medical equipment at the facilities, to ensure that every inmate in need of medical attention would be seen by qualified Physician when necessary. Finney v. Arkansas Board of Corrections, 505 F. 2d 194 (8th Cir. 1974) at 195.

This Appeals Court also stated that complaint of inmate stated claim for relief on theory that the prison work requirements constituted cruel and unusual punishment. Ray v. Mabry, 556 F. 2d 881 (8th Cir. 1977) at 882.

The Seventh Circuit Court of Appeals stated that to state a claim of cruel and unusual punishment for prison officials' alleged deliberate indifference to serious medical needs, a prisoner must allegh acts or commissions sufficiently harmful to evidence deliberate indifference to serious medical needs. Benson v. Cady, 761 F. 2d 335 (7th Cir. 1985) at 338.

This Court stated in the case of Estelle v. Gamble, that deliberate indifference to serious medical needs of prisoner's constitute s the unnecessary and wanton infliction of pain. 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976). Further this Court stated that whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards intentionally denying or delaying access to medical care or intentionally onterfering with the treatment once prescribed. Id at 104-105, 97 S. Ct. at 291,292.

CONCLUSION

The effort of the Defendants to present the case as an appropriate case for review under Rule 17 must fail. Stripped of the argument based upon the erroneous interpretation of the "frivolous" standard under 28 U.S.C. § 1915(d), this is a peculiar case based upon unique facts not likely to arise again and decided by the application of well-settled principles of federal constitutional law. It is not worthy of consideration of this Court under Rule 17.

Respectfully Submitted

Harry Lawrence Williams Sr.
Indiana State Reformatory
P.O. Box 30 20-10
Pendleton, Indiana 46064

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been duly served upon the individual whose name appears below, via United States Mail, first-class postage affixed on the 15th day of August 19 88 A.D.

Mr. Robert S. Spear
Deputy Attorney General
Office Of Attorney General
219 State House
100 North Capitol Avenue
Indianapolis, Indiana 46204

Harry Lawrence Williams Sr.
Respondent Pro se

AFFIDAVIT OF MAILING

To the best of my knowledge, this Brief in Opposition to the Petition for Writ of Certiorari has been placed in the United States Mail at the Indiana State Reformatory at 4:00 p.m. on the 19th day of August, 1988, correctly addressed to the Clerk of the United States Supreme Court and postage prepaid.

Harry Lawrence Williams Jr.

Harry Lawrence Williams Jr.

Subscribed and sworn to before me on this 19th day of August, 1988.

Mary J. Gaw

Notary Public, State at Large

County of Madison

My commission expires 3/29/92

NOTARY PUBLIC INDIANA

MOTION

Supreme Court, U.S.
FILED
NOV 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1882 (A)

IN THE

Supreme Court of the United States

October Term, 1988

DEAN NEITZKE, Individually and in his official capacity as Administrator of the Infirmary, Indiana Reformatory, and DR. HAN CHUL CHOI, Individually and in his official capacity as Medical Director, Indiana State Reformatory,

Petitioners,

v.

HARRY LAWRENCE WILLIAMS, SR.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' BRIEF OPPOSING RESPONDENT'S SUGGESTION OF MOOTNESS AND MOTION TO DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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STATEMENT OF THE CASE

A. Nature of the Case

This brief arises from the filing of a Suggestion Of Mootness And Motion To Dismiss The Writ Of Certiorari As Improvidently Granted.

B. Course of Proceedings

This action was initiated on November 7, 1986 when Respondent, Harry Lawrence Williams, Sr. (hereinafter Williams), filed his application to proceed *in forma pauperis* (J.A. 27) and the complaint he proposed to file pursuant to 42 U.S.C. § 1983 (J.A. 31). On January 16, 1987, the District Court entered an order which found that Williams' tendered complaint failed to state a claim under 42 U.S.C. § 1983 (J.A. 13, Petition for Writ of Certiorari, p. A-13). Therefore, his claims were deemed frivolous within the meaning of 28 U.S.C. § 1915(d) and leave to proceed *in forma pauperis* was denied and the complaint dismissed.

On January 28, 1987, Williams filed a motion to vacate judgment and motion to amend information (J.A. 54 & 60). On March 11, 1987, the District Court reaffirmed its order of January 16, 1987 and once again found that Williams' complaint was frivolous and failed to state a cognizable claim pursuant to 42 U.S.C. § 1983 (J.A. 23, Petition for Writ of Certiorari, p. A-23).

On January 12, 1988, the Seventh Circuit reversed the District Court and remanded the cause for further proceedings (J.A. 1, Petition for Writ of Certiorari, p. A-1). The Seventh Circuit agreed with the District Court by finding that the complaint failed to state a claim upon which relief could be granted, but reversed the denial of pauper status by holding that a complaint which fails to state a claim is not necessarily frivolous within the meaning of 28 U.S.C. § 1915. Neitzke and Choi's petition for rehearing was denied on February 12, 1988.

On May 12, 1988, Petitioners timely filed their Petition for Writ of Certiorari to the United States Court of Appeals for the

Seventh Circuit and said Petition was granted by this Court on October 3, 1988. However, during this time frame, the District Court reassumed jurisdiction and complied with the directions of the Seventh Circuit.

The docket sheet of the District Court, which is attached hereto as an appendix, indicates that Williams was granted pauper status and summons were issued on March 14, 1988. Various pleadings were filed including a motion to dismiss and an answer by the Petitioner-Defendants and an amended complaint by the Respondent-Plaintiff.

On September 19, 1988, the District Court once again dismissed Williams' complaint. (A-7). On September 26, 1988, Williams filed a motion to vacate said judgment (A-14). On November 14, 1988 the District Court vacated its order of September 19, 1988 and stayed the proceedings pending a final disposition of this appeal (A-19).

C. Facts Material to the Consideration of the Issues Presented

The questions raised by Respondent's Suggestion of Mootness and Motion to Dismiss are purely legal, namely, whether the actions of the District Court as stated above rendered the issue presented herein moot, and whether the Writ of Certiorari was improvidently granted.

ARGUMENT

A.

THE ISSUES RAISED HEREIN ARE NOT MOOT

"In general a case becomes moot '"when the issues presented are no longer 'live' or the party lacks a legally cognizable interest in the outcome"'" *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208, 63 L.Ed.2d 479 (1980), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950, 23 L.Ed.2d 491 (1969).

In the instant case, both aspects of the mootness question indicate that the case is not moot. First, a "live" controversy remains pending in the District Court which could be terminated if Petitioners' argument herein is accepted. Secondly, Petitioners' have a legally cognizable interest in the outcome of this appeal. Should this Court reverse the Seventh Circuit, the Petitioners would no longer be obligated to defend the action pending in the District Court or be involved in an appeal from any decision rendered by the District Court.

This Court's determination of the issue presented herein would terminate the present District Court action if the Court determines that the Seventh Circuit's order to grant pauper status was erroneous. This Court's decision will obviously affect an existing case and is of great importance not only to the Petitioners but to all district courts, all *pro se* pauper prisoner litigants and all possible defendants. There is an absolute conflict among the circuits concerning how to resolve this issue and it is assumed that certiorari was granted to resolve this conflict.

Respondent's suggestion that this case fails to present an issue capable of repetition yet evading review, is simply incorrect. While Petitioners strenuously contend that this case presents a currently live controversy between the parties, it should also be pointed out that the issue presented is a classic example of a recurring problem which evades review.

The Seventh Circuit decision routinely applied means simply that no defendant will be spared the filing of an admittedly meritorious motion to dismiss. Any future Seventh Circuit defendant will be required to challenge and stay application of the rule in this case in the rare hope that this Court will grant certiorari and reverse, all prior to filing his motion to dismiss in the district court. Seventh Circuit defendants, including Petitioners herein, will be faced repeatedly with meritless/frivolous *pro se* complaints which now must be answered since no district court in the circuit has any basis for denying pauper status and disposing of a response unless this Court decides this, the now controlling case, on the merits.

For these reasons, Petitioners request this Court to address the merits of the case and determine whether the Seventh Circuit erroneously imposed upon the Petitioners the burden and obligation to defend a case which fails to state a claim upon which relief can be granted.

B.

CERTIORARI WAS PROPERLY GRANTED

In his Motion to Dismiss, Respondent argues that "the question whether respondent's complaint was sufficient to state a claim is not an important question of federal law on which certiorari would ordinarily be granted" (Motion to Dismiss, P. 3). Respondent miscontrues the issue to be determined by the Court. The question is not whether Respondent's complaint stated a claim or whether the Seventh Circuit's findings concerning the sufficiency of the complaint were correct. The only issue raised by the Petitioners is whether the Seventh Circuit applied an appropriate standard by which to determine whether a pauper's complaint is frivolous within the meaning of 28 U.S.C. § 1915(d).

The question presented involves a federal question involving the interpretation of a federal statute, 28 U.S.C. § 1915(d). As described in the Petition for Writ of Certiorari, the various circuits are in conflict on this issue. Several circuits have held that a complaint which fails to state a claim is frivolous within the meaning of 28 U.S.C. § 1915(d). The Seventh Circuit has now come to a contrary determination. The conflict is dramatically illustrated by the fact that the Fifth Circuit has instructed their district courts to do exactly what the Seventh Circuit is prohibiting in this case. *See*, *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). The issue is of great importance to all district courts, all *pro se* pauper litigants and all possible defendants because each and every complaint submitted pursuant to 28 U.S.C. § 1915 will be judged by the standard announced by this Court in this case, as opposed to the various standards now in effect in the circuits. Added significance attaches because of the large volume of pauper litigation which

currently clogs the courts. In recent years, the federal courts have struggled with the burdens imposed by frivolous pauper litigation and this Court should not pass up the opportunity to provide guidance to the federal courts on how to properly address the issues raised by *pro se* litigants requesting pauper status. This Court properly granted certiorari and agreed to review this issue. This determination should not now be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Court deny Respondents' Suggestion of Mootness and Motion To Dismiss The Writ of Certiorari As Improvidently Granted and proceed to consider the merits of the issue presented.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: _____
ROBERT S. SPEAR
Chief Counsel

By: _____
DAVID A. NOWAK
Deputy Attorney General

Attorneys for Petitioners

sld:8148E

APPENDIX

PLAINTIFFS	DEFENDANTS
WILLIAMS, SR., HARRY LAWRENCE	FAULKNER, GORDON H., Individually and in his official capacity as Commissioner Indiana Dept. of Correction COHN, EDWARD L., individually and in his official capacity as Superintendent Indiana State Reformatory HANKS, CRAIG A., individually and in his official capacity as Assistant Superintendent of Operations, Indiana State Reformatory NEITZKE, DEAN, individually and in his official capacity as Administrator of the Infirmary Indiana State Reformatory DR. HAN CHUL CHOI, Individually in his official capacity as Administrator of the infirmary, Indiana State Reformatory
Prisoner — civil rights	

ATTORNEYS

Pro Se #21896 Indiana Reformatory P.O. Box 30, 11-10 Pendleton, Ind. 46064	DAVID A. NOWAK Deputy Attorney General 219 State House Indpls., Ind. 46204 (317) 232-6325 attorney for Dr. Han Chul Choi and Dean Neitzke.

DATE	PROCEEDINGS
11/7/86	Application to proceed in forma pauperis and certificate of accounts available filed.
12/1/86	Affidavit of Harry Williams.
12/8/86	Affidavit of Carrie Douglas.
12/15/86	Plaintiff files Motion to amend, c/s
12/16/86	Affidavit of Terry Seriduc
1/16/87	Court files entry stating that plaintiff take nothing by way of his complaint and that said complaint is hereby dismissed. c/m CASE CLOSED (E.O.D. 1/23/87)
1/28/87	Plaintiff files Motion to vacate Judgment; Memorandum of law; affidavit.
3/11/87	Court entry. Plaintiff's motion for appointment of counsel is denied. Plaintiff's motion to vacate judgment is Denied. cm
3/16/87	Plaintiff files notice of appeal to the United States Court of Appeals for the Seventh Circuit from the orders of Jan. 16, 1987 and March 11, 1987. Copy of the notice of appeal sent to the court reporter and the attorneys of record. Copy of the notice of appeal, docket entries, information sheet, orders sent to the court of appeals. Filing fees not paid.
3/23/87	Appeal docketed in the court of appeals on March 18, 1987. Assigned number 87-1417.
3/26/87	Plaintiff files: 1) Motion for leave to proceed in forma pauperis and for appointment of counsel. 2) Affidavit in support, c/s.
4/13/87	Court entry. March 16, 1987 motion for leave to proceed in forma pauperis and for appointment of counsel on appeal is Denied. cm Copy mailed to the court of appeals.

4/27/87	Record on appeal consisting of one volume pleading forwarded to the court of appeals pursuant to the court of appeals written request.
2/29/88	Certified copy of Judgment received from Court of Appeals dated January 1988. Judgment of District court is AFFIRMED IN PART, REVERSED IN PART, case is REMANDED. 1 volume of pleadings received.
2/24/88	CASE REOPENED
3/14/88	GRANTS pauper status as to Dr. Choi and Dean Neitzke. Summons issued. Sent to Marshal for service.
3/21/88	PLAINTIFF: (1) Motion for order compelling discovery.c/s
3/31/88	U.S. MARSHAL RETURN — Pltf. — Summons & Complaint — Cert. Mail.: 1) Indiana State Reformatory — 3/21/88 — Han Chul Choi, etal. 2) Dean Neitzke — Unexecuted.
4/13/88	PLAINTIFF: (1) Affidavit for entry of default c/s
3/31/88	DENIES pltf's Motion for Order Compelling Discovery, Pltf has not complied with Rule 13. c/m (JPE)
4/13/88	ISSUES Scheduling Order. (JPE)
4/19/88	PLAINTIFF: (1) Motion for Default. (against defts. Han Chul Choi and Dean Neitzke)
4/25/88	PLAINTIFF: (1) Affidavit for extension of time c/s
4/27/88	PLAINTIFF: (1) Motion for an order compelling discovery.c/s (2) Motion to amend c/s

4/27/88	DEFENDANTS, DEAN NEITZKE AND DR. HAN CHUL CHOI: (1) Motion to Dismiss. c/s (2) Memorandum in support of Motion to dismiss. c/s (3) Response to pltfs. motion for defautlt c/s (4) Appearance by David A. Nowak, Deputy Atty. General.
5/2/88	PLAINTIFF: (1) response to defts. motion to dismiss. c/s
5/3/88	DENIES Pltfs Motion for Order to Compel Discovery. c/m (JPE) DENIES Pltfs Motion to Amend. c/m (JPE) DENIES Pltfs Motion for Extension of Time. c/m (JPE)
5/6/88	DENIES Pltfs Motion for Default. c/m (JPE)
5/16/88	PLAINTIFF: (1) motion for an order compelling discovery, c/s.
5/17/88	DEFENDANTS: (1) preliminary list of witnesses, c/s.
5/24/88	DEFENDANTS: 1) Response to motion for an order compelling discovery. c/s
6/6/8	PLAINTIFF: (1) Preliminary list of witnesses. c/s
6/8/88	PLAINTIFF: (1) Motion for enlargement of time c/s
6/10/88	GRANTS Plft's Motion for Enlargement of Time to Amend Complaint to & including. JPE
7/1/88	DEFENDANTS, Han Chul Choi and Dean Neitzke: (1) Answer. c/s.

7/7/88	PLAINTIFF: (1) Motion for leave to proceed in forma pauperis & appt. of counsel. (2) Affidavit in support of motion to proceed in forma pauperis. (3) Complaint.
7/20/88	PLAINTIFF: (1) Response to defts. answer to pltfs. amended complaint c/s
8/1/88	DEFENDANTS: (1) Preliminary list of exhibits c/s
8/17/88	DEFENDANTS: (1) preliminary list of exhibits c/s
9/19/88	ENTRY, MEMORANDUM IN SUPPORT and JUDGMENT. Application to proceed in forma pauperis and for appointment of counsel are DENIED. Motion to dismiss is GRANTED. CAUSE DISMISSED. c/m. (EOD 9/21/88) (cc)
9/26/88	PLAINTIFF; (1) Motion to vacate Judgment. c/s
11/3/88	Pursuant to phone call from Seventh Circuit Court of Appeals, this action is on appeal in the U.S. Supreme Court, Cause Numbver 87-1 (filed May 12, 1988)
11/14/88	Judgment VACATED and this matter is STAYED pending final disposition defendant's appeal by the Supreme Court. (EOD 11/14/88)
11/14/88	Record on Appeal consisting of 1 volume of pleadings forwarded to U.S. Supreme Court pursuant to written request.
11/14/88	ENTERS order vacating judgment of September 19, 1988, for lack of jurisdiction and STAYS further action in this cause pending final disposition of defendant's appeal by United States Supreme Court. c/m (EOD 11/16/88) CC

11/21/88	U.S. Supreme Court returns receipt of 1 volume of pleadings. Received in Supreme Court on 11/17/88. Cause Number 87-1882.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. IP 86-1307-C
HAN CHUL CHOI, Individually, and in his Official Capacity of Medical Director, Indiana State Reformatory, and DEAN NEITZKE, Individually and is his Official Capacity of Infirmary Administrator, Indiana State Reformatory,	)	
Defendants.	)	

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H.I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by way of his complaint and that this action is hereby DISMISSED.

Dated this 19th day of September, 1988.

/s/ Sarah Evans Barker

SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. IP 86-1307-C
HAN CHUL CHOI, Individually, and in his Official Capacity of Medical Director, Indiana State Reformatory, and DEAN NEITZKE, Individually and is his Official Capacity of Infirmary Administrator, Indiana State Reformatory,	)	
Defendants.	)	

ENTRY

This cause is before the Court upon *pro se* plaintiff Harry Lawrence Wiliams' tendered amended complaint and on his application to proceed *in forma pauperis* and for appointment of counsel. Also before the Court is a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) filed by defendants Han Chul Choi and Dean Neitzke.

The Court, having read and examined such application, amended complaint, and motion to dismiss, and being duly advised, does hereby deny plaintiff's application to proceed *in forma pauperis* and for appointment of counsel. The Court further GRANTS defendants' motion to dismiss.

IT IS SO ORDERED.

Dated this 19th day of September, 1988.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

MEMORANDUM

I. Introduction

Plaintiff, Harry Lawrence Williams ("Williams") initiated this action on November 7, 1986, when he filed his application to proceed *in forma pauperis* on a tendered complaint as amended and filed pursuant to the provisions of 42 U.S.C. § 1983. Plaintiff's original complaint named as defendants Gordon H. Faulkner, Commissioner, Indiana Department of Correction; Edward L. Cohn, Superintendent, Indiana State Reformatory; Craig A. Hanks, Superintendent of Operations, Indiana State Reformatory; Dean Neitzke, Administrator of the Infirmary, Indiana State Reformatory; and Dr. Han Chul Choi, Medical Director, Indiana State Reformatory.

On January 16, 1987, this Court entered a judgment whereby the original complaint was dismissed. In that judgment, this Court explained that the plaintiff's claims were frivolous and failed to state a cognizable claim pursuant to 42 U.S.C. § 1983.

An appeal was taken to the Seventh Circuit which affirmed the decision in part and reversed in part. The Seventh Circuit reversed the dismissal but only with regard to the medical claims asserted against defendants Choi and Neitzke. The Seventh Circuit made the reversal based on a finding that this Court improperly applied the Rule 12(b)(6) standard to determine if plaintiff's claims were frivolous within the meaning of 28 U.S.C. § 1915. The Court of Appeals found that a complaint can be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d) only if "the petitioner can make no rational argument in law or facts to support his (or her) claim for relief." *Williams v. Faulkner*, 837 F.2d 304, 306 (7th Cir. 1988). Therefore, even though a complaint fails to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the complaint may contain a rational argument in law or facts which supports a claim for relief. In such a case, the grant of a 12(b)(6) motion would be proper while a *sua sponte* dismissal under 28 U.S.C. § 1915(d) would not. The Seventh Circuit held that the dismissal of plaintiff's Eight Amendment claims as frivolous was improper

because plaintiff had a rational argument for such. However, the dismissal of plaintiff's due process claim was found to be proper because the complaint fails to reveal any rational argument in law or fact to support this claim. *Id.* at 308. The court also found that the complaint was properly dismissed as frivolous as against defendants Hank, Cohn, and Faulkner. Williams alleged no personal involvement on their part, and their positions as Assistant Superintendent (Hanks), Superintendent of the Indiana State Reformatory (Cohn), and as Commissioner of the Indiana Department of Corrections (Faulkner) do not justify any inference of personal involvement in the alleged deprivation of medical care. *Duncan v. Duckworth*, 644 F.2d 653, 656 (7th Cir. 1981); *Boyce v. Alizaduh*, 595 F.2d 948, 953 (4th Cir. 1979). Also, the Court found that recovery against these three defendants cannot be imposed vicariously on a theory of *respondeat superior*. *Williams v. Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988). The Court, therefore, found that dismissal against these three defendants as frivolous was proper. Therefore, this Court currently has before it on remand only plaintiff's Eighth Amendment claims of insufficient medical treatment as asserted against defendants Choi and Neitzke.

II. Complaint

Williams is presently confined at the Indiana State Reformatory in Pendleton, Indiana. On July 7, 1988, Williams filed a renewed complaint naming Choi and Neitzke as defendants which the Court will treat as the amended complaint. Plaintiff claims that the defendants failed to provide plaintiff with proper medical treatment in violation of the Eighth Amendment. Plaintiff seeks a declaratory judgment, preliminary and permanent injunction, compensatory and punitive damages, costs and any other proper relief.

This Court is mindful of its duty to liberally construe *pro se* pleadings drafted by prisoners. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972). In determining the sufficiency of the tendered complaint, we have given the movant "the benefit of the doubt." *McKeever v. Israel*, 689 F.2d 1315, 1322 (7th Cir. 1982).

Nonetheless, even with this liberality accorded movant, the Court finds that his allegations are vague and conclusory and will not suffice to state a claim upon which relief can be granted.

III. Inadequate Medical Treatment

When imposing imprisonment as a punishment for a crime, the state obliges itself to provide persons in its custody with medical care which meets minimal standards of adequacy. The obligation to provide medical care is enforceable as a federal claim since inadequate medical care for prisoners violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Second Circuit has pointed out that the policy of deferring to the discretion of prison officials with regard to prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts. *Todaro v. Ward*, 565 F.2d 48, 54 (2d Cir. 1977).

Plaintiffs can establish an eighth amendment violation based on insufficient medical care only if they can prove that there has been a "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. at 104. Such "deliberate indifference" can be evidenced by "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" or it can be shown by "proving there are such systematic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted), *cert. denied*, 450 U.S. 1041 (1981).

Plaintiff claims that he had "a small tumor in the pina [sic] region of the brain" when he was transferred to the reformatory. Plaintiff allegedly told the medical staff this and the staff took no action. Plaintiff claims he subsequently complained of dizziness, which the staff also disregarded. Plaintiff states that his condition worsened and he was taken to the infirmary and given a blood test. After receiving the results from the blood test, the medical staff released plaintiff back

into the general population. Plaintiff states he has informed the staff that he had been medically authorized to be placed in idle status due to the brain tumor affecting his equilibrium, but was nonetheless given a work assignment. Plaintiff states that infirmary records show he was checked for the brain tumor on September 11, 1986, but he denies this occrred on that date and furthermore that the office lacks the requisite equipment for such a test. Plaintiff also states that defendant Dr. Choi was practicing medicine without a license during this period.

Both this Court, on initial examination, and the Seventh Circuit, on appeal, found that plaintiff's assertions failed to satisfy the *Estelle* standard by failing to bring forth facts indicating a deliberate indifference to a serious medical need has occurred. The Court of Appeals stated that it agreed with this court "that Williams' eighth amendment allegations fail to demonstrate the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6). *Williams v. Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988). Plaintiff's amended complaint adds nothing further which satisfies the *Estelle* standard.

Plaintiff has not alleged that his tumor is the type which is properly treated with active medical procedures, nor has he alleged that his work assignment has caused him any serious physical injury. Although plaintiff does assert that prison officials did not follow the medical recommendation that plaintiff be placed on idle status, plaintiff has not alleged a sufficiently egregious injury to give rise to what has been termed a "constitutional tort", actionable under 42 U.S.C. § 1983. *See Williams v. Kelly*, 624 F.2d 695 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981); *Ellsworth v. Mockler*, 554 F. Supp. 1072 (N.D. Ind. 1983); *Ricketts v. Derello*, 574 F. Supp. 645 (E.D. Pa. 1983).

IV. Treatment by Unlicensed Physician

Plaintiff's final claim, based on his medical treatment, is that his treatment was performed and supervised by someone practicing medicine without a license, defendant doctor Han Chul Choi. In October of 1984, Dr. Choi's state license to dispense

controlled substances expired. Although his federal license was still valid, Indiana law requires physicians to possess both state and federal licenses. As a result of a subsequent investigation, Dr. Choi's license to practice medicine was suspended from August 30, 1986 to September 5, 1986. The investigation apparently revealed no serious improprieties, and the brief suspension was based solely upon the procedural irregularity of Dr. Choi's state license expiration (Dr. Choi refiled for the state license the day after being formally notified of its expiration.) As the relevant medical treatment took place prior to the suspension, no constitutional liability may be found to arise from Dr. Choi's brief absence from the practice of medicine.

Accordingly, the Court finds that the tendered amended complaint fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. As a result, plaintiff's motion to proceed *in forma pauperis* and for appointment of counsel is DENIED and defendant's motion to dismiss is GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,
Plaintiff,

vs. CAUSE NO.
IP86-1307C

HAN CHUL CHOI, et al.,
Defendants,

MOTION TO VACATE JUDGMENT

The Plaintiff moves in this Court for an order pursuant to Rule 59(e) of the Federal Rules Of Civil Procedure vacating the judgment of this Court, entered on the 19th day of September, 1988, which dismissed the Plaintiffs' complaint and granted the Defendants Motion To Dismiss. This motion is based on the papers and files in this matter and the memorandum of law attached hereto.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 21st day of September, 1988.

Respectfully Submitted

_____

Harry Lawrence Williams
Plaintiff Pro-se

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,
Plaintiff,

vs. CAUSE NO.
IP86-1307C

HAN CHUL CHOI, et al.,
Defendants,

MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO VACATE JUDGMENT

Comes now the Plaintiff, Harry Lawrence Williams, pro se and without the assistance of counsel, and in support of his motion to vacate judgment adopts this memorandum of law. This Court issued its Pre-Trial Scheduling Order in this cause on or about the 13th day of April, 1988. In conjunction with the judgment of the Seventh Circuit judgment of the case at bar, the Defendants have Petitioned the United States Supreme Court for a Writ of Certiorari, which is currently pending.

1. The Plaintiff contends that he has met the burden of establishing the denial of adequate medical treatment as prescribed by the Justices of the United States Supreme Court in the case of *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976) in that the Plaintiff has shown that the Defendants failed to adequately diagnose the cause of the dizziness experienced by the Plaintiff.

2. That the Defendants admitted the averments listed in the amended complaint filed by the Plaintiff under the section of IV. Facts, specifically, subsections a, c, d, e, i, j, l, and p, such averments containing the fact that the Plaintiff was compelled to climb three (3) flights of steps, when the documents presented by the Plaintiff and later placed in the Medical Packet of the Plaintiff by Defendant Han Chul Choi states that the Plaintiff must remain on the ground floor at all times as the Plaintiff is subject to seizure.

3. The Plaintiff contends that at the time of the filing of this action the Defendants lack the proper machinery to perform the Q/T Boan to determine the extent of the tumor, or to perform any test to determine the existence of a tumor, and as demonstrated in the exhibits listed in the original complaint, the Supervisor of the Garment Manufacturing Shop filed a statement that on the date of the 11th day on September, 1986, the Plaintiff was in the Garment Manufacturing Shop thereby masting the requirement under *Estelle*. Further, the Plaintiff contends that by the Defendants having released him into "general population" after the return of the results of the blood test performed after the constant complaint of the Plaintiff regarding the worsened condition placed his life in jeopardy as the Plaintiff had no control of his equilibrium.

4. The United States Court Of Appeals for the Second (2nd) Circuit held in the case of *Todaro v. Ward*, 565 F. 2d 48 (1977) that a constitutional claim is stated when prison officials intentionally deny access to medical care or interfere with prescribed treatment. The Plaintiff contends that the Defendants violated his Eighth (8th) Amendment right to adequate medical care as it was known by various members of the staff of the Indiana State Reformatory that the Plaintiff was suffering from a loss of his equilibrium and such information was passed on to the Defendants. See: *Estelle v. Gamble*, supra, 429 U.S. at 104-05, 97 S. Ct. 285; *Martines v. Manousi*, 443 F. 2d 921 (2d Cir. 1970) cert. denied, 401 U.S. 983, 91 S. Ct. 1202, 28 L. Ed. 2d 335 (1971); *Corby v. Conboy*, 457 F. 2d 251 (2d Cir. 1972).

5. That during the time of the suffering of the loss of his equilibrium the Plaintiff was informed that he would be held in the Disciplinary Segregation Unit of the Indiana State Reformatory on a charge of intoxication, although the Defendants had prior knowledge of the medical problems of the Plaintiff, rather than to place the Plaintiff in the Infirmary ward for diagnosis of the reasons for the loss of his equilibrium. In the case of *Todaro v. Ward*, 565 F. 2d 48 (1977) the United States Court of Appeals for the Second Circuit held that series of incidents closely related in time may disclose pattern of con-

duct amounting to deliberate indifference to medical needs of prisoners and when systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, court will not hesitate to use its injunctive powers. See also: *Bishop v. Stoneman*, 508 F. 2d 1224 (2d Cir. 1974); *Newman v. Alabama*, 503 F. 2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948, 95 S. Ct. 1680, 44 L. Ed. 102 (1975); *Crus v. Ward*, 558 F. 2d 658, 662 (2d Cir. 1977).

6. The Plaintiff contends that the Indiana State Reformatory was grossly under staffed during the period that the Plaintiff was suffering the loss of his equilibrium as there was a Medical Technician on duty after three o'clock (3:00) P.M. and during this time the Plaintiff went through many of the problems with his equilibrium, as can be noted in the Medical Packet compiled by the Indiana Department of Corrections, and which/such medical packet contains portions of the Plaintiffs Medical History compiled by Wishard Memorial Hospital.

WHEREFORE, the Plaintiff prays that this Court vacate the judgment entered in this cause on or about the 19th day of September, 1988, and for all other relief just and proper in the promises.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 21st day of September, 1988.

Respectfully Submitted

_____

Harry Lawrence Williams
Plaintiff Pro se

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing MOTION TO VACATE JUDGMENT AND ATTACHED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE JUDGMENT has been sent to the individual whose name appears below, via United States Mail, first-class postage affixed on this 21st day of September, 1988.

Mr. Linley E. Pearson, esq.
Attorney General Of Indiana

Office of Attorney General
219 State House
100 North Capitol Avenue
Indianapolis, Indiana 46204

_____
Harry L. Williams

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. IP 86-1307-C
HAN CHUL CHOI, Individually, and in his Official Capacity of Medical Director, Indiana State Reformatory, and DEAN NEITZKE, Individually and is his Official Capacity of Infirmary Administrator, Indiana State Reformatory,	)	
Defendants.	)	

ENTRY

This cause is before the Court on plaintiff's motion to vacate judgment dismissing plaintiff's claim dated September 19, 1988. This Court notes that on January 12, 1988, the United States Court of Appeals for the Seventh Circuit remanded this case based upon its finding that this Court improperly dismissed the action as frivolous under 28 U.S.C. § 1915(d). *Williams v. Faulkner*, 837 F.2d 304 (7th Cir. 1988). The Seventh Circuit further stated that although plaintiff's complaint could not be dismissed as frivolous, it did not state a claim sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Id.*

Accordingly, on remand, defendants filed an answer along with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This Court concluded plaintiff failed to state a claim upon which relief could be granted and entered its judgment dismissing plaintiff's complaint of September 19, 1988.

Unknown to the Court at the time of its judgment, defendants had filed a notice of appeal with the Seventh Circuit on

May 12, 1988 and on May 16, 1988, had filed their petition for writ of certiorari with the Supreme Court of the United States. The Supreme Court subsequently granted certiorari on October 3, 1988.

The jurisdiction of the Supreme Court attaches upon the timely filing of a notice of appeal. *United Public Workers v. Mitchell*, 330 U.S. 75, 84-86 (1947). Consequently, since defendants' notice of appeal was timely filed (*see* 28 U.S.C. § 2101(c)), this Court had no jurisdiction to entertain defendants' motion to dismiss.

Accordingly, the Court finds it lacked jurisdiction to enter the judgment dated September 19, 1988 dismissing plaintiff's complaint. Therefore, the judgment is hereby VACATED and this matter is STAYED pending final disposition of defendants' appeal by the Supreme Court.

IT IS SO ORDERED.

Dated this 14th day of November, 1988.

/s/ Sarah Evans Barker

SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

MOTION

Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1882

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DEAN NEITZKE, etc., et al.

Petitioners,

v.

HARRY LAWRENCE WILLIAMS, SR.,

Respondent.

On Writ of Certiorari to the Court of Appeals for the Seventh Circuit

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RESPONDENT'S SUGGESTION OF MOOTNESS AND MOTION TO DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

GEORGE A. RUTHERGLEN
(Appointed by this Court)
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
Charlottesville, VA 22901
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RESPONDENT'S SUGGESTION OF MOOTNESS AND MOTION TO DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

Respondent in the above entitled case files this memorandum to advise the Court of proceedings in the District Court which may render the question presented to this Court moot.

In this prisoner's civil rights action, respondent Williams filed a motion to proceed in forma pauperis in the District Court. His action was dismissed as frivolous under 28 U.S.C. § 1915(d) because his complaint failed to state a claim. The District Court entered this order *sua sponte*, without the benefit of adversarial proceedings or a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The Court of Appeals affirmed in part, but reversed and remanded insofar as respondent asserted claims against petitioners Neitzke and Choi, holding that these claims were not frivolous even though they would not survive a motion to dismiss under Rule 12(b)(6). Pet. Cert. at A-7. Petitioners then filed their petition for certiorari, raising the question whether the standard for frivolousness under section 1915(d) is the same as the standard for dismissal under Rule 12(b)(6).

Because petitioners did not seek a stay of the mandate of the Court of Appeals, the case was remanded to the District Court for further proceedings. Fed. R. App. P. 41. Petitioners then moved to dismiss respondent's complaint for failure to state a claim. The District Court granted this motion on September 19, 1988, after the petition for certiorari and the brief in opposition had been filed in this Court. Respondent then moved to vacate this order on September 21, 1988, arguing that his complaint did state a claim. On November 14, 1988, after certiorari was granted, the District Court vacated its order dismissing the complaint on the ground that the filing of the

petition of certiorari deprived it of jurisdiction. Copies of the District Court's orders are attached as an appendix to this memorandum.

Because respondent has not cross-petitioned for certiorari, the judgment of the Court of Appeals is before this Court only insofar as it is favorable to him. In the proceedings on remand, however, the District Court has now given respondent the full benefit of the judgment of the Court of Appeals. By considering and granting petitioners' motion to dismiss for failure to state a claim, the District Court has granted respondent a full adversarial hearing on the sufficiency of his claims. Nothing in the District Court's subsequent decision to vacate its dismissal is likely to alter its assessment of the sufficiency of respondent's complaint. The decision to vacate was solely on the ground that the filing of the petition for certiorari deprived it of jurisdiction, not on the ground that its original dismissal was erroneous, as respondent had argued in his motion to vacate.

The proceedings in the District Court have rendered the question presented to this Court moot. This question is whether the standard for dismissal of frivolous complaints under section 1915(d) is the same as the standard for dismissal for failure to state a claim under Rule 12(b)(6). Resolution of this question cannot affect the ultimate outcome of this case. At most, it will determine whether the District Court should classify its decision on the pending motion to dismiss as a decision under section 1915(d) or as a decision under Rule 12(b)(6). A decision by the District Court, on remand from this Court, that respondent's complaint fails to state a claim would effectively end this litigation, no matter what it is called. And conversely, a decision that respondent's complaint does

succeed in stating a claim would keep this case alive, no matter what it is called.

Moreover, the question presented to this Court does not fit within the category of issues "capable of repetition but evading review." In any subsequent case raising this question, prison officials can preserve the question for review by obtaining a stay of the mandate of the Court of Appeals. Fed. R. App. P. 41(b). Petitioners could have obtained a stay of the mandate from the Court of Appeals upon a specific motion demonstrating that the petition for certiorari is not frivolous or filed merely for delay. Seventh Cir. R. 17(a).[1]

Respondent, of course, will continue to oppose any motion to dismiss his complaint for failure to state a claim, but this question was neither presented to this Court nor squarely decided by the Court of Appeals. The statement of the Court of Appeals that the complaint failed to state a claim against petitioners was dictum, clearly unnecessary for, and indeed, inconsistent with, its decision to remand the case to the District Court for further proceedings. Pet. Cert. at A-7, A-10. In addition, the question whether respondent's complaint was sufficient to state a claim is not an important question of federal law on which certiorari would ordinarily be granted. Sup. Ct. R. 17.1(c). It

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[1] Seventh Circuit Rule 17(a) provides in full:

In the interest of minimizing unnecessary delay in the administration of justice, this court's mandate will normally issue 21 days after a decision or seven days after the denial of the petition for rehearing, whichever is later. The mandate will not be stayed, regardless of the filing in the Supreme Court of a petition for certiorari before the date for issuance of the mandate, except upon a specific motion substantiated by a showing, or an independent determination by the court, of probable cause to believe that the petition for certiorari which will be or has been filed is not or will not be frivolous or filed merely for delay.

concerns instead the application of settled standards for evaluating claims of denial of medical treatment in violation of the Eighth Amendment. These standards were set forth over a decade ago in *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976). The application of these standards to the record in this case involves a detailed assessment of the sufficiency of respondent's complaint. Because this question has not yet been squarely addressed by the Court of Appeals, there is as yet no risk of a conflict among the circuits or a conflict with the decisions of this Court. Sup. Ct. R. 17.1(a), (c).

CONCLUSION

Respondent brings these developments to the attention of the Court because they were not known or had not occurred when certiorari was granted. If the Court concludes that its own decision in this case can have no effect upon subsequent proceedings in the District Court, then the question presented is moot. Because only the question presented is moot, but not the entire case, the petition for certiorari should be dismissed as improvidently granted.

Alternatively, the Court might conclude that the decision of the Court of Appeals, insofar as it is favorable to respondent, is also moot. In that case, the judgment of the Court of Appeals should be vacated insofar as it reversed and remanded the judgment of the District Court. Because the underlying case is not moot, however, the Court of Appeals should not be directed to dismiss the case, but only to vacate that part of the District Court's judgment which dismissed as frivolous respondent's claims against petitioners under the Eighth Amendment. *Cf. United States* v. *Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950).

Respectfully submitted,

GEORGE A. RUTHERGLEN
(Appointed by this Court)
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
Charlottesville, VA 22901
(804) 924-7015
Counsel for Respondent

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 86-1307-C

HARRY LAWRENCE WILLIAMS,
Plaintiff,

v.

HAN CHUL CHOI, Individually and in his Official Capacity of Medical Director, Indiana State Reformatory, and DEAN NEITZKE, Individually and in his Official Capacity of Infirmary Administrator, Indiana State Reformatory,
Defendants.

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H.I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by way of his complaint and that this action is hereby DISMISSED.

Dated this 19th day of September, 1988.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 86-1307-C

(TITLE OMITTED IN PRINTING)

ENTRY

This cause is before the Court upon *pro se* plaintiff Harry Lawrence Williams' tendered amended complaint and on his application to proceed *in forma pauperis* and for appointment of counsel. Also before the Court is a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) filed by defendants Han Chul Choi and Dean Neitzke.

The Court, having read and examined such application, amended complaint, and motion to dismiss, and being duly advised, does hereby deny plaintiff's application to proceed *in forma pauperis* and for appointment of counsel. The Court further GRANTS defendants' motion to dismiss.

IT IS SO ORDERED.

Dated this 19th Day of September, 1988.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

MEMORANDUM

I. Introduction

Plaintiff, Harry Lawrence Williams ("Williams") initiated this action on November 7, 1986, when he filed his application to proceed *in forma pauperis* on a tendered complaint as

amended and filed pursuant to the provisions of 42 U.S.C. § 1983. Plaintiff's original complaint named as defendants Gordon H. Faulkner, Commissioner, Indiana Department of Correction; Edward L. Cohn, Superintendent, Indiana State Reformatory; Craig A. Hanks, Superintendent of Operations, Indiana State Reformatory; Dean Neitzke, Administrator of the Infirmary, Indiana State Reformatory; and Dr. Han Chul Choi, Medical Director, Indiana State Reformatory.

On January 16, 1987, this Court entered a judgment whereby the original complaint was dismissed. In that judgment, this Court explained that the plaintiff's claims were frivolous and failed to state a cognizable claim pursuant to 42 U.S.C. § 1983.

An appeal was taken to the Seventh Circuit which affirmed the decision in part and reversed in part. The Seventh Circuit reversed the dismissal but only with regard to the medical claims asserted against the defendants Choi and Neitzke. The Seventh Circuit made the reversal based on a finding that this Court improperly applied the Rule 12(b)(6) standard to determine if plaintiff's claims were frivolous within the meaning of 28 U.S.C. §1915. The Court of Appeals found that a complaint can be dismissed as frivolous pursuant to 28 U.S.C. §1915(d) only if "the petitioner can make no rational argument in law or facts to support his (or her) claim for relief." *Williams* v. *Faulkner*, 837 F.2d 304, 306 (7th Cir. 1988). Therefore, even though a complaint fails to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the complaint may contain a rational argument in law or facts which supports a claim for relief. In such a case, the grant of a 12(b)(6) motion would be proper while a *sua sponte* dismissal under 28 U.S.C. § 1915(d) would not. The Seventh Circuit held that the dismissal of plaintiff's Eighth Amendment claims as frivolous was improper because plaintiff had a rational argument for such. However, the dismissal of plaintiff's due process claim was found to be proper because the complaint fails to reveal any rational argument in law or fact to support this claim. *Id.* at 308. The court also found that the complaint was properly dismissed as frivo-

lous as against defendants Hank, Cohn, and Faulkner. Williams alleged no personal involvement on their part, and their positions as Assistant Superintendent (Hanks), Superintendent of the Indiana State Reformatory (Cohn), and as Commissioner of the Indiana Department of Corrections (Faulkner) do not justify any inference of personal involvement in the alleged deprivation of medical care. *Duncan* v. *Duckworth*, 644 F.2d 653, 656 (7th Cir. 1981); *Boyce* v. *Alizaduh*, 595 F.2d 948, 953 (4th Cir. 1979). Also, the Court found that recovery against these three defendants cannot be imposed vicariously on a theory of *respondeat superior*. *Williams* v. *Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988). The Court, therefore, found that dismissal as against these three defendants as frivolous was proper. Therefore, this Court currently has before it on remand only plaintiff's Eighth Amendment claims of insufficient medical treatment as asserted against defendants Choi and Neitzke.

II. Complaint

Williams is presently confined at the Indiana State Reformatory in Pendleton, Indiana. On July 7, 1988, Williams filed a renewed complaint naming Choi and Neitzke as defendants which the Court will treat as the amended complaint. Plaintiff claims that the defendants failed to provide plaintiff with proper medical treatment in violation of the Eighth Amendment. Plaintiff seeks a declaratory judgment, preliminary and permanent injunction, compensatory and punitive damages, costs and any other proper relief.

This Court is mindful of its duty to liberally construe *pro se* pleadings drafted by prisoners. *Haines* v. *Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972). In determining the sufficiency of the tendered complaint, we have given the movant "the benefit of the doubt." *McKeever* v. *Israel*, 689 F.2d 1315, 1322 (7th Cir. 1982). Nonetheless, even with this liberality accorded movant, the Court finds that his allegations are vague and conclusory and will not suffice to state a claim upon which relief can be granted.

III. Inadequate Medical Treatment

When imposing imprisonment as a punishment for a crime, the state obliges itself to provide persons in its custody with medical care which meets minimal standards of adequacy. The obligation to provide medical care is enforceable as a federal claim since inadequate medical care for prisoners violates the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976). The Second Circuit has pointed out that the policy of deferring to the discretion of prison officials with regard to prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts. *Todaro* v. *Ward*, 565 F.2d 48, 54 (2d Cir. 1977).

Plaintiffs can establish an eighth amendment violation based on insufficient medical care only if they can prove that there has been a "deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U.S. at 104. Such "deliberate indifference" can be evidenced by "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" or it can be shown by "proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Ramos* v. *Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted), *cert. denied*, 450 U.S. 1041 (1981).

Plaintiff claims that he had "a small tumor in the pinal [sic] region of the brain" when he was transferred to the reformatory. Plaintiff allegedly told the medical staff this and the staff took no action. Plaintiff claims he subsequently complained of dizziness, which the staff also disregarded. Plaintiff states that his condition worsened and he was taken to the infirmary and given a blood test. After receiving the results from the blood test, the medical staff released plaintiff back into the general population. Plaintiff states he has informed the staff that he had been medically authorized to be placed in idle status due to the brain tumor affecting his equilibrium, but was nonetheless given a work assignment. Plaintiff states that

infirmary records show he was checked for the brain tumor on September 11, 1986, but he denies this occurred on that date and furthermore that the office lacks the requisite equipment for such a test. Plaintiff also states that defendant Dr. Choi was practicing medicine without a license during this period.

Both this Court, on initial examination, and the Seventh Circuit, on appeal, found that plaintiff's assertions failed to satisfy the *Estelle* standard by failing to bring forth facts indicating a deliberate indifference to a serious medical need has occured. The Court of Appeals stated that it agreed with this court "that Williams' eighth amendment allegations fail to demonstrate the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6). *Williams* v. *Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988). Plaintiff's amended complaint adds nothing further which satisfies the *Estelle* standard.

Plaintiff has not alleged that his tumor is the type which is properly treated with active medical procedures, nor has he alleged that his work assignment has caused him any serious physical injury. Although plaintiff does assert that prison officials did not follow the medical recommendation that plaintiff be placed on idle status, plaintiff has not alleged a sufficiently egregious injury to give rise to what has been termed a "constitutional tort," actionable under 42 U.S.C. § 1983. *See Williams* v. *Kelly*, 624 F.2d 695 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981); *Ellsworth* v. *Mockler*, 554 F. Supp. 1072 (N.D. Ind. 1983); *Ricketts* v. *Derello*, 574 F. Supp. 645 (E.D. Pa. 1983).

IV. Treatment by Unlicensed Physician

Plaintiff's final claim, based on his medical treatment, is that his treatment was performed and supervised by someone practicing medicine without a license, defendant doctor Han Chul Choi. In October of 1984, Dr. Choi's state license to dispense controlled substances expired. Although his federal license was still valid, Indiana law requires physicians to possess both

state and federal licenses. As a result of subsequent investigation, Dr. Choi's license to practice medicine was suspended from August 30, 1986 to September 5, 1986. The investigation apparently revealed no serious improprieties, and the brief suspension was based solely upon the procedural irregularity of Dr. Choi's state license expiration (Dr. Choi refiled for the state license the day after being formally notified of its expiration.) As the relevant medical treatment took place prior to the suspension, no constitutional liability may be found to arise from Dr. Choi's brief absence from the practice of medicine.

Accordingly, the Court finds that the tendered amended complaint fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. As a result, plaintiff's motion to proceed *in forma pauperis* and for appointment of counsel is DENIED and defendant's motion to dismiss is GRANTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP 86-1307-C

(TITLE OMITTED IN PRINTING)

ENTRY

This cause is before the Court on plaintiff's motion to vacate judgment dismissing plaintiff's claim dated September 19, 1988. This Court notes that on January 12, 1988, the United States Court of Appeals for the Seventh Circuit remanded this case based upon its finding that this Court improperly dismissed the action as frivolous under 28 U.S.C. § 1915(d). *Williams* v. *Faulkner*, 837 F.2d 304 (7th Cir. 1988). The Seventh Circuit further stated that although plaintiff's complaint could not be dismissed as frivolous, it did not state a claim sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Id.*

Accordingly, on remand, defendants filed an answer along with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This Court concluded plaintiff failed to state a claim upon which relief could be granted and entered its judgment dismissing plaintiff's complaint of September 19, 1988.

Unknown to the Court at the time of its judgment, defendants had filed a notice of appeal with the Seventh Circuit on May 12, 1988 and on May 16, 1988, had filed their petition for writ of certiorari with the Supreme Court of the United States. The Supreme Court subsequently granted certiorari on October 3, 1988.

The jurisdiction of the Supreme Court attaches upon the timely filing of a notice of appeal. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 84-86 (1947). Consequently, since

defendants' notice of appeal was timely filed (*see* 28 U.S.C. § 2101(c)), this Court had no jurisdiction to entertain defendants' motion to dismiss.

Accordingly, the Court finds it lacked jurisdiction to enter the judgment dated September 19, 1988 dismissing plaintiff's complaint. Therefore, the judgment is hereby VACATED and this matter is STAYED pending final disposition of defendants' appeal by the Supreme Court.

IT IS SO ORDERED.

Dated this 14th Day of November, 1988.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

JOINT

APPENDIX

(5)

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1882

IN THE

Supreme Court of the United States

October Term 1988

DEAN NEITZKE, Individually and in his official capacity as Administrator of the Infirmary, Indiana Reformatory, and DR. HAN CHUL CHOI, Individually and in his official capacity as Medical Director, Indiana State Reformatory,

Petitioners,

vs.

HARRY LAWRENCE WILLIAMS, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 12, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

Central Publishing Company, Inc., 401 North College Avenue, Indianapolis, Indiana

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In the

United States Court of Appeals

For the Seventh Circuit

No. 87-1417

HARRY LAWRENCE WILLIAMS, SR.,

Plaintiff-Appellant,

v.

GORDON H. FAULKNER, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP 86 1307 C—**Sarah Evans Barker**, *Judge*.

SUBMITTED NOVEMBER 17, 1987*—DECIDED JANUARY 12, 1988

Before BAUER, *Chief Judge*, and COFFEY and FLAUM, *Circuit Judges*.

FLAUM, *Circuit Judge*. Harry Lawrence Williams, Sr. appeals from the district court's order dismissing his *pro se* complaint as frivolous, pursuant to 28 U.S.C. § 1915(d), and denying him leave to proceed *in forma pauperis*. For

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* After a preliminary examination of the briefs filed in this appeal, the court notified the parties that it had tentatively concluded that oral argument would not be helpful. This notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). None of the parties filed such a statement, and therefore the appeal was submitted on the briefs and record.

the reasons stated below, we affirm in part, reverse in part, and remand to the district court for further proceedings.

I.

Plaintiff-appellant Harry Williams, Sr. is an inmate in the custody of the Indiana Department of Corrections. A doctor at the Indiana State Prison diagnosed Williams as having a small brain tumor which affects his equilibrium. Because of this condition, the prison doctor placed Williams on "medical idle status" for one year, and noted that "it is very likely that he will have this condition for some time to come."

Upon his transfer to the Indiana State Reformatory on October 18, 1985, Williams notified the Reformatory's medical staff about his brain tumor and the prison doctor's recommendation that he remain on "medical idle status." In his complaint, Williams alleged that on several occasions he asked to be seen by the doctor at the Reformatory for treatment of his tumor. He further alleged that although he was examined several times during the following year, the Reformatory doctors refused to treat Williams for his brain tumor. Williams was also forced to work in the Reformatory's garment manufacturing industry despite the prison doctor's recommended work restriction. In October of 1986, one year after his transfer to the Reformatory, Williams' equilibrium problems worsened; as a result, he refused to continue working in the Reformatory's garment manufacturing industry. The Reformatory Conduct Adjustment Board disciplined Williams for his refusal to work by transferring him to a less desirable cellhouse.

Williams filed a *pro se* complaint alleging that various Indiana state prison officials violated his rights under the eighth and fourteenth amendments by denying him medical treatment and transferring him to a less desirable cellhouse without due process in violation of 42 U.S.C. § 1983. In addition to his complaint, Williams filed a motion to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). The district court dismissed Williams' complaint *sua sponte* under 28 U.S.C. § 1915(d),[1] finding the complaint frivolous because it failed to state a claim upon which relief could be granted. The district court also denied Williams leave to proceed *in forma pauperis*.[2]

In response, Williams filed a motion to vacate the court's judgment and a motion which the district court construed to be a motion to amend his complaint. The district court held that Williams' amended complaint still failed to state a claim upon which relief could be granted and was therefore frivolous within the meaning of 28 U.S.C. § 1915(d); the court affirmed its previous order dismissing Williams' complaint *sua sponte*. Williams filed a timely notice of appeal.

Because we conclude that the district court applied an incorrect standard for determining when a *sua sponte* dismissal of a *pro se* complaint is appropriate under 28 U.S.C. § 1915(d), we reverse its judgment in part and remand for further proceedings. Even under the appropriate *sua sponte* dismissal standard, however, Williams' due process claim is clearly frivolous. We therefore affirm that part of the district court's judgment dismissing Williams' due process claim.

---

[1] The statute provides, in relevant part, that "[t]he court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d).

[2] The district court's denial of Williams' motion to proceed *in forma pauperis* was consistent with the procedure outlined in *Wartman v. Branch 7, Civil Division, County Court*, 510 F.2d 130, 132-34 (7th Cir. 1975). In *Wartman*, this court stated that a district court may deny a motion to proceed *in forma pauperis* if it finds that the complaint is frivolous. Other circuits, however, grant or deny *in forma pauperis* status based on the plaintiff's financial resources alone and then independently determine whether to dismiss the complaint as frivolous. *See, e.g., Franklin v. Murphy*, 745 F.2d 1221, 1226-27 n.5 (9th Cir. 1984); *Boyce v. Alizudah*, 595 F.2d 948, 950-51 (4th Cir. 1979).

II.

A.

To ensure that indigents have access to the courts, Congress enacted 28 U.S.C. § 1915[3] which established a system for *in forma pauperis* litigation. Congress recognized, however, the danger that without the monetary disincentives to filing suit, the federal courts could be opened to a flood of spurious litigation. *Jones v. Morris*, 777 F.2d 1277, 1278-79 (7th Cir. 1985), *cert. denied*, 475 U.S. 1053 (1986); *Brandon v. District of Columbia Board of Parole*, 734 F.2d 56, 59 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985). To address these competing concerns, Congress gave district courts the authority to dismiss frivolous or malicious *in forma pauperis* complaints. 28 U.S.C. § 1915(d); *Jones*, 777 F.2d at 1279. A district court's discretion to dismiss *pro se, in forma pauperis* complaints, however, is limited "in every case by the language of the statute itself which restricts its application to complaints found to be frivolous or malicious." *Jones*, 777 F.2d at 1279 (*quoting Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir. 1985)). A frivolous complaint is one in which "the petitioner can make no rational argument in law or facts to support his [or her] claim for relief." *Jones*, 777 F.2d at 1279-80 (*quoting Corgain v. Miller*, 708 F.2d 1241, 1247 (7th Cir. 1983)); *see also Brandon*, 734 F.2d at 59 (a frivolous *pro se* complaint is one where "there is indisputedly absent any factual and legal basis for the asserted wrong.").

---

[3] 28 U.S.C. § 1915(a) provides:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs of security therefore, by a person who makes affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

B.

The district court dismissed Williams' complaint because it failed to state a claim upon which relief could be granted; the court thereby equated the dismissal standards of Rule 12(b)(6) and § 1915(d). This case therefore raises the question of whether our established test for the *sua sponte* dismissal of frivolous *pro se, in forma pauperis* complaints under 28 U.S.C. § 1915(d) differs in any respect from the test for the dismissal of a complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[4] Rule 12(b)(6) permits the dismissal of a complaint for failure to state a claim upon which relief can be granted only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 42 (1957); *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985). Under § 1915(d), in contrast, an *in forma pauperis, pro se* complaint can be dismissed *sua sponte* by the district court only if the petitioner cannot make any rational argument in law or fact which would entitle him or her to relief. Thus, the § 1915(d) test is less stringent than the Rule 12(b)(6) dismissal standard. The fact that a *pro se, in forma pauperis* complaint fails to state a claim upon which relief could be granted under Rule 12(b)(6) does not, in and of itself, warrant the *sua sponte* dismissal of the case as frivolous under § 1915(d).[5]

---

[4] Rule 12(b)(6) provides in pertinent part:

> Every defense, in law or fact, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> . . . .
>
> (6) failure to state a claim upon which relief can be granted
>
> . . . .

Fed. R. Civ. P. 12(b)(6).

[5] There are, however, situations where a complaint both fails to state a claim upon which relief can be granted pursuant to 12(b)(6)

(Footnote continued on following page)

In the limited circumstance of *pro se, in forma pauperis* litigation, *sua sponte* dismissal is appropriate only if the complaint is frivolous or malicious within the meaning of § 1915(d).

Our holding that the test for dismissal under § 1915(d) is not the same as the test for a 12(b)(6) dismissal, is in accord with the United States Court of Appeals for the District of Columbia Circuit's decision in *Brandon*, 734 F.2d 56. The *Brandon* court held that "a complaint need not indisputably state a cause of action to survive *sua sponte* dismissal; instead, if the complaint has at least *an arguable* basis in law and fact—if the complaint is *viable*—it cannot be deemed frivolous." *Id.* at 59 (emphasis in the original). The *Brandon* court's focus, as well as our own, is on a district court's *sua sponte* dismissal of a *pro se, in forma pauperis* complaint.

Although our decision today does not alter our previous standard for frivolity—where the petitioner can make no rational argument in law or fact to support his or her claim for relief—we emphasize that this threshold determination, when made without the benefit of defendant's pleadings, must be more lenient than the determination to dismiss a complaint under 12(b)(6). A *pro se, in forma pauperis* complaint should not be dismissed *sua sponte* as frivolous unless there is "indisputably absent any factual or legal basis for the asserted wrong." *Brandon*, 734 F.2d at 59. In a close case, the court should permit the claim to proceed at least to the point where responsive pleadings are required. *Jones*, 777 F.2d at 1281. This rule should actually reduce the work of the federal courts by preventing, through premature dismissal, the creation of appeals based on incomplete records. *Id.* at 1280.

[5] *continued*
and is frivolous within the meaning of § 1915(d). One common example is a case in which it is clear that the defendants are immune from suit. *See, e.g., Williams v. Goldsmith*, 701 F.2d 603 (7th Cir. 1982) (all defendants absolutely immune).

III.

Applying the proper standard for a *sua sponte* dismissal of a *pro se, in forma pauperis* complaint, we conclude that the district court prematurely dismissed Williams' eighth amendment claim. At this stage of the proceedings, we must consider all of the documents Williams filed in support of his claim and accept his allegations as true. *See Matzker v. Herr*, 748 F.2d 1142, 1148 n.5 (7th Cir. 1984). Williams alleged in his complaint that he was diagnosed as having a brain tumor that affects his equilibrium; that the defendant Dr. Choi was aware of his condition; that Dr. Choi did not give Williams any treatment for the tumor,[6] thereby endangering his life; and that he was forced to work in the Reformatory garment manufacturing industry despite the recommendation of the prison doctor that he be placed on medical idle status.

We agree with the district court that Williams' eighth amendment allegations fail to demonstrate the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6). *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976), *reh. denied*, 429 U.S. 1066 (1977); *Campbell v. Greer*, No. 86-2256, slip op. at 3-4 (7th Cir. Sept. 9, 1987); *Shockley v. Jones*, 823 F.2d 1068, 1072 (7th Cir. 1987); *Duckworth v. Franzen*, 780 F.2d 645, 652-53 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 71 (1986). Williams' complaint, however, is not frivolous within the meaning of 28 U.S.C. § 1915(d) because we cannot state with certainty that Williams is unable to make any rational argument in law or fact to support his claim for relief. Because

[6] Appellees' counsel argues on appeal that Williams' own submissions to the court establish that in fact he has been treated for the brain tumor. They point to a "Notice of Tort Claim," attached to Williams' complaint, where Williams states that Dr. Choi treated him for "a seizure disorder." We cannot definitively conclude, however, that the seizure disorder was a result of, or in any way related to, the brain tumor. In any event, we must accept Williams' allegations as true at this stage of the proceedings.

Williams' eighth amendment claim was not frivolous as to some of the defendants, the district court should have required those defendants to answer the complaint.

Williams specifically alleged that Dr. Choi refused to treat his brain tumor even though Williams informed him of its existence; this allegation is sufficient to demonstrate Dr. Choi's responsibility for the alleged eighth amendment violation. Additionally, at the pleading stage we can presume that defendant Nietzke, in his role as Administrator of the Infirmary, was responsible to ensure that Williams received adequate medical care. We therefore can infer Nietzke's personal involvement in the alleged misconduct for the purpose of evaluating the district court's dismissal of Williams' complaint. *See Duncan v. Duckworth*, 644 F.2d 653, 655 (7th Cir. 1981). We hold, therefore, that as to defendants Choi and Nietzke, the district court improperly dismissed Williams' eighth amendment claim and we reverse and remand to the district court for further proceedings.

As to defendants Hank, Cohn, and Faulkner, however, we agree that the complaint should be dismissed as frivolous. Williams alleged no personal involvement on their part, and their positions as Assistant Superintendent (Hanks), Superintendent of the Indiana State Reformatory (Cohn), and as Commissioner of the Indiana Department of Corrections (Faulkner) do not justify any inference of personal involvement in the alleged deprivation of medical care. *Id.* at 656; *Boyce v. Alizaduh*, 595 F.2d 948, 953 (4th Cir. 1979). Recovery against these three defendants cannot be imposed vicariously on a theory of *respondeat superior*. *See Duncan*, 644 F.2d at 655; *Adams v. Pate*, 445 F.2d 105, 107 (7th Cir. 1971). We therefore conclude that the complaint was properly dismissed as frivolous as to these three defendants because Williams cannot make any rational argument in law or fact to support his claim for relief against them.

IV.

In his complaint, Williams also alleged that his due process rights under the fourteenth amendment were violated when he was transferred, without a classification hearing, from one cellhouse to another because he refused to work. The district court concluded that Williams had not alleged any deprivations of liberty or property as a result of his transfer and, in any event, that he had no constitutionally protected right to remain in any particular wing of the institution. The district court therefore held that Williams' fifth amendment claim failed to state a claim upon which relief could be granted and *sua sponte* dismissed that count of the complaint. The relevant inquiry, however, is whether or not Williams can make any rational argument in law or fact to support this claim. Because Williams' due process claim cannot meet this test, it was properly dismissed *sua sponte*.

Prisoners have no constitutionally protected liberty interest in remaining in any particular wing of a prison. *Hanvey v. Pinto*, 441 F.2d 1154, 1155 (3rd Cir. 1971). *See also Hewitt v. Helms*, 459 U.S. 460, 468 (1983) (no liberty interest in remaining in prison's general population); *Meachum v. Fano*, 427 U.S. 215, 224-25, *reh. denied*, 429 U.S. 873 (1976) (no liberty interest in remaining in a particular institution within state system); *Shango v. Jurich*, 681 F.2d 1091, 1098 (7th Cir. 1982) (same); *Corgain v. Miller*, 708 F.2d 1241, 1252 (7th Cir. 1983) (no liberty interest in remaining in state, as opposed to federal, custody). Absent some statutory or regulatory provision that clearly limits prison officials in the exercise of their discretion, a prisoner may be transferred for any reason, or for no reason at all.[7] *Shango*, 681 F.2d at 1100. Williams

[7] A well-established exception to this broad grant of discretion is that prison officials may not transfer a prisoner in retaliation for his exercise of a constitutionally protected right. *Shango*, 681 F.2d at 1098 n.13; *Buise v. Hudkins*, 584 F.2d 223, 229 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979). Williams has not, however, alleged any facts that suggest that his transfer was in retaliation for the exercise of a constitutionally protected right.

has not relied on any Indiana statute or regulation limiting the prison officials' discretion to transfer him to a different cellhouse. Because we are not aware of any such limitation, we hold that Williams cannot make any rational argument in law or fact to support his due process claim. We therefore affirm the district court's *sua sponte* dismissal of Williams' due process claim.

V.

For the foregoing reasons, the district court's order dismissing *sua sponte* Williams' *pro se* complaint and denying him leave to proceed *in forma pauperis* is affirmed in part and reversed in part. This case is remanded to the district court for further proceedings consistent with this opinion.

A true Copy:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

February 12, 1988.

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge

HENRY LAWRENCE WILLIAMS, SR., *Plaintiff-Appellant*,	)
No. 87-1417	)
v.	)
GORDON H. FAULKNER, Individually and in his Official Capacity as Commissioner, Indiana Department of Correction; EDWARD L. COHN, Individually and in his Official Capacity as Superintendent, Indiana State Reformator; CRAIG A. HANKS, Individually and in his Official Capacity as Assistant Superintendent, Indiana State Reformatory; DEAN NEITZKE, Individually and in his Official Capacity as Administratory of the Infirmary, Indiana State Reformatory; and DR. HAN CHUL CHOI, Individually and in his Official Capacity as Medical Director, Indiana State Reformatory.	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.) No. IP 86-1307-C Sarah Evans Barker, *Judge*.
Defendants-Appellees.	)

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants-appellees on January 26, 1988, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS SR.,)
)
Plaintiff,)
)
vs.) Cause No. IP 86-1307-C
)
GORDON H. FAULKNER,)
Individually and in his Official)
Capacity as Commissioner, Indiana)
Department of Correction;)
EDWARD L. COHN, Individually)
and in his Official Capacity as)
Superintendent, Indiana State)
Reformatory; CRAIG A. HANKS,)
Individually and in his Official)
Capacity as Assistant)
Superintendent of Operations,)
Indiana State Reformatory, DEAN)
NEITZKE, Individually and in his)
Official Capacity as Administrator)
of the Infirmary, Indiana State)
Reformatory; and DR. HAN CHUL)
CHOI, Individually and in his)
Official Capacity as Medical)
Director, Indiana State)
Reformatory,)

Defendants.

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H. I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by way of his complaint and that said complaint is hereby DISMISSED.

Dated this 16th day of January, 1987.

/s/ _____
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS SR.,)
)
Plaintiff,)
)
vs.)
)
GORDON H. FAULKNER,)
Individually and in his Official)
Capacity as Commissioner, Indiana) Cause No. IP 86-1307-C
Department of Correction;)
EDWARD L. COHN, Individually)
and in his Official Capacity as)
Superintendent, Indiana State)
Reformatory; CRAIG A. HANKS,)
Individually and in his Official)
Capacity as Assistant)
Superintendent of Operations,)
Indiana State Reformatory, DEAN)
NEITZKE, Individually and in his)
Official Capacity as Administrator)
of the Infirmary, Indiana State)
Reformatory; and DR. HAN CHUL)
CHOI, Individually and in his)
Official Capacity as Medical)
Director, Indiana State)
Reformatory,)

Defendants.

ENTRY

This matter is before the Court upon the application of Harry Lawrence Williams for leave to proceed in forma pauperis on a tendered civil rights complaint as amended brought pursuant to 42 U.S.C. § 1983. Plaintiff has no credit in his inmate trust account and is thus presumptively eligible to proceed as a

pauper. However, an examination of the tendered complaint reveals that the movant has failed to state a cognizable claim upon which relief can be granted against the named defendants. Movant's claims are thus frivolous and must be dismissed pursuant to 28 U.S.C. § 1915(d).

Movant is presently confined at the Indiana State Reformatory in Pendleton, Indiana. Movant makes essentially two claims: first, that the defendants failed to provide plaintiff with proper medical treatment in violation of the eighth amendment and second, that the defendants violated plaintiff's due process rights by subjecting him to a disciplinary action and otherwise transferring him without a due process hearing. Plaintiff seeks a declaratory judgment, preliminary and permanent injunction, compensatory and punitive damages, costs and any other proper relief.

This Court is mindful of its duty to liberally construe *pro se* pleadings drafted by prisoners. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972). In determining the sufficiency of the tendered complaint we have given the movant "the benefit of the doubt." *McKeever v. Israel*, 689 F.2d 1315, 1322 (7th Cir. 1982). Nonetheless, even with this liberality accorded movant, the Court finds that his allegations are vague and conclusory and will not suffice to state a claim upon which relief can be granted.

Inadequate Medical Treatment

When a state imposes imprisonment as a punishment for crime, it accepts the obligation to provide persons in its custody with a medical care system that meets minimal standards of adequacy. This obligation is enforceable in federal court, as inadequate medical care for prisoners violates the eighth amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *id.* at 116 n. 13 ("denial of medical care is surely not part of the punishment which civilized nations may impose for crime.") (Stevens, Jr., dissenting). "When systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hestiate to use its injunctive powers." *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977)

(Kaufman, C.J.) The policy of deferring to the judgment of prison officials in matters of prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts. *Id.* at 54. *Compare Bell v. Wolfish*, 441 U.S. 520, 551 n. 32 (1979) (deferring to prison officials' judgment on means to control smuggling of money, drugs and weapons into prison).

With respect to medical care, plaintiffs can establish an eighth amendment violation only if they can prove that there has been a "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. at 104. "It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." *Id.* at 106. As a practical matter, "deliberate indifference" can be evidenced by "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" or it can be demonstrated by "proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted), *cert. denied*, 450 U.S. 1041 (1981). *See also Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977); *Wellman v. Faulkner*, 715 F.2d 269, 271-72 (7th Cir. 1983). As the Supreme Court noted in *Estelle*, however, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." 429 U.S. at 105-06.

Plaintiff claims that he had "a small tumor in the pinal [sic] region of the brain" when he was transferred to the reformatory. Plaintiff allegedly told the medical staff this and the staff took no action. Plaintiff claims he subsequently complained of dizziness, which the staff also disregarded. Plaintiff states that his condition worsened and he was taken to the infirmary and given a blood test. After receiving the results from the blood test, the medical staff released plaintiff back into the general population. Plaintiff states he had informed the staff that he had been medically authorized to be placed in idle status due to the brain tumor affecting his equilibrium, but

was nonetheless given a work assignment. Plaintiff states that infirmary records show he was checked for the brain tumor on September 11, 1986, but he denies this occurred on that date and furthermore that the office lacks the requisite equipment for such a test. Plaintiff also states that defendant Dr. Choi was practicing medicine without a license during this period.

Plaintiff has failed to satisfy the *Estelle* standard in that he has failed to bring forth facts indicating a deliberate indifference to a serious medical need has occurred. Plaintiff has not alleged that his tumor is the type which is properly treated with surgery or other active medical procedure, nor has he alleged that his work assignment caused him any serious physical injury. While plaintiff does state that the prison administrators did not follow the medical recommendation that plaintiff be placed in idle status, plaintiff has not alleged a sufficiently egregious injury to give rise to what has been termed a "constitutional tort", actionable under the substantive aspect of the due process clause. *See Williams v. Kelly*, 624 F.2d 695 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981); *Ellsworth v. Mockler*, 554 F. Supp. 1072 (N.D. Ind. 1983); *Ricketts v. Derello*, 574 F. Supp. 645 (E.D. Pa. 1983). Plaintiff's proper avenue for relief is through the prison administrative procedures, or in state court under a tort claim.

Plaintiff's final claim based on his medical treatment is that his treatment was performed and supervised by someone practicing medicine without a license, defendant doctor Han Chul Choi. A call to the Indiana Medical Licensing Board reveals Dr. Choi's true medical history. In October of 1984, Dr. Choi's state license to dispense controlled substances expired. Although his federal license was still valid, Indiana law requires physicians to possess both state and federal licenses. As a result of a subsequent investigation, Dr. Choi's license to practice medicine was suspended from August 30, 1986 to September 5, 1986. The investigation apparently revealed no serious improprieties, and the brief suspension was based solely upon the procedural irregularity of Dr. Choi's state license expiration (Dr. Choi refiled for the state license the day after being

formally notified of its expiration). As the relevant medical treatment took place prior to the suspension, no constitutional liability may be found to arise from Dr. Choi's brief absence from the practice of medicine.

Transfer

On October 23, 1986, plaintiff was transferred from "J" cellhouse, the honor cellhouse, to "G" cellhouse and placed on holdover status. Plaintiff claims that this transfer was the result of his not working and, because he allegedly was denied a classification hearing, has occurred in violation of his due process rights.

An inmate has no constitutionally protected right to be incarcerated in a particular institution. *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 681 F.2d 1091 (7th Cir. 1982). Thus, the transfer of inmates from one prison to another is generally considered to be a matter within the internal administration of the prison. *Loebath v. Civiletti*, 516 F. Supp. 73 (S.D. Ind. 1980). It is similarly permissible to freely transfer prisoners from one wing of an institution to another. *Harvey v. Pinto*, 441 F.2d 1154 (3rd Cir. 1971). Plaintiff has not alleged any accompanying deprivations of liberty or property resulting from the transfer; only that he is on hold status in his new cellhouse. Plaintiff has not alleged that the hold status is a result of his failure to work. Instead, it appears that plaintiff is on hold status while a place is being found for him in "G" cellhouse. Therefore, plaintiff has not alleged any facts indicating that his due process rights were violated by the transfer.

Accordingly, the Court finds that the tendered complaint fails to state a claim under 42 U.S.C. § 1983. As a result, plaintiff's claims are frivolous within the meaning of 28 U.S.C. § 1915(d) and leave to proceed in forma pauperis is DENIED and the accompanying complaint DISMISSED.

IT IS SO ORDERED.

Dated this 16th day of January, 1987.

/s/ Sarah Evans Barker

SARAH EVANS BARKER,
Judge
United States District Court
Southern District of Indiana

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Dean Neitzke, Administrator of
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Dr. Han Chul Choi, Medical Director
Indiana State Reformatory
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Honorable Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HENRY LAWRENCE WILLIAMS, SR., *Plaintiff,*	)	
	)	CAUSE NO.
VS.	)	
	)	IP 86-1307-C
GORDON H. FAULKNER, Individually and in his Official Capacity as Commissioner, Indiana Department of Correction; EDWARD L. COHN, Individually and in his Official Capacity as Superintendent, Indiana State Reformatory; CRAIG A. HANKS, Individually and in his Official Capacity as Assistant Superintendent of Operations, Indiana State Reformatory; DEAN NEITZKE, Individually and in his Official Capacity as Administrator of the Infirmary, Indiana State Reformatory; and DR. HAN CHUL CHOI, Individually and in his Official Capacity as Medical Director, Indiana State Reformatory.	)	
Defendants.	)	

ENTRY

This matter is before the Court on the motion of Harry L. Williams Sr. to vacate judgment with attached memorandum of law filed pursuant to the provisions of Rule 59(e). Fed. R. Civ. P. and a "motion to amend information" which the Court elects to treat as a second amendment to the tendered complaint.

The "amendment" deals with matters unrelated and subsequent to the events described in the first amended complaint and adds nothing to the Court's analysis of the issues presented therein.

The Court has reviewed its entry of January 16, 1987, which denied leave to proceed in forma pauperis on the tendered complaint, Mr. Williams made two assertions of unconstitutional conduct by his custodians: 1) that he received inadequate medical treatment by untrained technicians and an unlicensed medical doctor; and 2) that he was subjected to a disciplinary action and was transferred from the honor cellhouse without a due process hearing.

The Court also notes that upon review of the file a motion for appointment of counsel had been tendered by Mr. Williams as part of the motion to proceed in forma pauperis. Since the entry fails to address this motion, the Court does so at this time.

Under the doctrine of *Brown-bey v. United States*, 720 F.2d 467 (7th Cir. 1983) the appointment of counsel issue must be addressed prior to a decision on the merits. The Court must consider the criteria as delineated in *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981). The first of these criteria and the most significant is the plaintiff's ultimate success on the merits. For the reasons set forth in the decision of January 16, 1987, and hereinafter, the movant's chances of success are insubstantial and his motion for appointment of counsel must be DENIED.

The plaintiff's tendered complaint concerns his medical treatment and the results of his abandonment of his job in the prison industries.

The leading case involving a prisoner petition concerning inadequate medical care is *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). In *Estelle*, the plaintiff received a back injury while on his prison work assignment. He was examined and sent back to work, but later he was re-examined, prescribed a pain killer, and allowed to remain in his cell. Over the next three (3) months he was seen by medical personnel seventeen (17) times and treated for his back injury,

high blood pressure, and heart problems. On several occasions, however, his requests to be taken to the infirmary were refused by guards, and he was kept in administrative segregation, apparently for refusal to work. On one occasion his prescription for pain pills went unfilled for a four-day period because pharmacy staff lost it. No x-ray was taken of the plaintiff's back and certain other appropriate tests were not conducted. The Supreme Court found that the plaintiff's complaint was insufficient to state a claim against the prison medical director. The Court stated that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment,'" 429 U.S. at 104-105. The Court then elaborated this standard as follows:

> [A]n inadvertent failure to provide adequate medical care cannot be said to constitute "an unnecessary and wanton infliction of pain" or to be "repugnant to the conscience of mankind." Thus, a complaint that a physician had been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.

429 U.S. at 105-06. *See also Penn v. Starks*, 275 F. Supp. 1240, 1243 (N.D. Ind. 1983) and cases cited therein.

Both *Estelle* and *Penn* are factually similar to the case at bar and the holdings in those cases are dispositive here. In both those cases, as here, the plaintiffs received medical treatment on several occasions. The plaintiff here, like the plaintiffs in *Estelle* and *Penn*, complains of the type or quality of medical care, and such a complaint does not arise to the level of deliberate indifference resulting in the wanton infliction of pain required for a deprivation of constitutional rights.

The Court again concludes that the tendered amended complaint fails to state a § 1983 action or any other constitutional action and the Court must, therefore, deny relief.

Since the motion originally filed with designated as one under Rule 59(e) and since the motion has been denied, the Court, pursuant to the rule delineated in *Averhart v. Arrendondo*, 773 F.2d 919 (7th Cir. 1985)) and *Muhammad v. DeRobertis*, 788 F.2d 1268 (7th Cir. 1986) now notifies the movant that if he wishes to appeal either from this order or from the original judgment a new notice of appeal must be filed in accordance with the provisions of Rule 4(a)(4), Fed. R. App. P.

Dated this 11th day of March, 1987.

/s/ Sarah Evans Barker
SARAH EVANS BARKER,
Judge
United States District Court
Southern District of Indiana

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Pendleton, Indiana 46064

Honorable Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

AO 240 (Rev. 6/82) Application to Proceed in F... a Prisoner, Supporting Documentation and Order

United States District Court

Southern DISTRICT OF Indiana

UNITED STATES OF AMERICA
V.
Gordon H. Faulkner

APPLICATION TO PROCEED IN FORMA PAUPERIS, SUPPORTING DOCUMENTATION AND ORDER

CASE NUMBER
IP86-1307-C

FILED
U.S. DISTRICT COURT
S.D. OF IND. DIVISION
1987 2 24 PM '86

I, Harry Lawrence Williams Sr., declare that I am the (check appropriate box)

☒ petitioner/plaintiff ☐ movant (filing 28 U.S.C. 2255 motion)

☐ respondent/defendant ☐ other

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows.

In further support of this application, I answer the following questions.

1. Are you presently employed? Yes ☐ No ☒
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received. October 15, 1986 $20.02 I.C. this Month C.C.S. Inmate.

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or other form of self-employment Yes ☐ No ☒
   b. Rent payments, interest or dividends? Yes ☐ No ☒
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☒
   d. Gifts or inheritances? Yes ☐ No ☒
   e. Any other sources? Yes ☐ No ☒

AO 240 (Rev. 5/85)

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings accounts?
Yes ☐ No ☒ (Include any funds in prison accounts.)
If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?
Yes ☐ No ☒
If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

FILED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
CLERK

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 3, 1986 (Date)

Harry Lawrence Williams
Signature of Applicant

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant named herein has the sum of $ _____ on account to his credit at the Indiana Reformatory institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: None

I further certify that during the last six months the applicant's average balance was $ 0.00

Authorized Officer of Institution

ORDER OF COURT

The application is hereby denied

United States Judge — Date

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

United States Judge or Magistrate — Date

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS SR.
PLAINTIFF

VS. CAUSE NO. _____

GORDON H. FAULKNER; ETAL
DEFENDANTS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

PLAINTIFF MOVE THIS COURT FOR AN ORDER PERMITTING HIM TO FILE THIS ACTION IN FORMA PAUPERIS WITHOUT PREPAYMENT OF FEES AND COST OR SECURITY THEREFOR, AND APPOINTING MR. HERBERT W. JOHNSON JR., 302 NORTH EAST STREET, INDIANAPOLIS, INDIANA 46204, A MEMBER OF THE INDIANA BAR, TO REPRESENT PLAINTIFF AS PROVIDED IN 28 U.S.C. SEC. 1915 (D) AND 18 U.S.C. SEC. 3006A(G), BECAUSE AS HIS ATTACHED AFFIDAVIT INDICATE, PLAINTIFF IS UNABLE TO PAY SUCH COST OR GIVE SECURITY THEREFOR, AND HE CANNOT AFFORD TO EMPLOY AN ATTORNEY. THIS MOTION IS BASED ON THE COMPLAINT, AFFIDAVIT SUBMITTED HEREWITH.

RESPECTFULLY SUBMITTED

/s/ Harry Lawrence Williams

HARRY LAWRENCE WILLIAMS
D.O.C. #21896
INDIANA STATE REFORMATORY
P.O. BOX 30 11-1D
PENDLETON, INDIANA 46064

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS D!'VISION

HARRY LAWRENCE WILLIAMS SR.
PLAINTIFF

VS. CAUSE NO. _____

GORDON H. FAULKNER; ETAL
DEFENDANTS

AFFIDAVIT IN SUPPORT OF MOTTION TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

I, HARRY LAWRENCE WILLIAMS SR. DECLARES:

(1) I AM THE PLAINTIFF IN THE ABOVE-TITLED ACTION.

(2) I BELIEVE I AM ENTITLED AND INTEND TO BRING THIS ACTION IN THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF INDIANA AGAINST THE ABOVE-NAMED DEFENDANTS.

(3) THE ACTION SEEKS TO ENJOIN THOSE DEFENDANTS FROM DEPRIVING PLAINTIFF OF ADEQUATE MEDICAL ATTENTION AND DUE PROCESS CLASSIFICATION PROCEEDINGS AND SEEKS DAMAGES IN THE AMOUNT OF FOUR-HUNDRED-THOUSAND ($400,000) DOLLARS FOR DEPRIVATION OF PLAINTIFFS' CIVIL RIGHTS.

(4) I BELIEVE THAT I AM ENTITLED TO THE REDRESS SOUGHT IN THIS ACTION.

(5) I HAVE READ AND KNOW THE CONTENTS OF THE COMPLAINT AND BELIEVE THEM TO BE TRUE.

(6) I AM WITHOUT ASSETS AND HAVE NO INCOME OTHER THAN STATE PAY.

(7) I NEED MY INCOME FOR MY PERSONAL MAINTENANCE.

(8) BECAUSE OF MY POVERTY I AM UNABLE TO PAY THE COST OF THIS ACTION, TO GIVE SECURITY THEREFOR, OR TO EMPLOY AN ATTORNEY.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED AT PENDLETON, INDIANA ON THIS 27TH DAY OF OCTOBER 1986.

RESPECTFULLY SUBMITTED

/s/ Harry Lawrence Williams Sr.

HARY LAWRENCE WILLIAMS SR.
D.O.C. #21896
INDIANA STATE REFORMATORY
P.O. BOX 30 11-1D
PENDLETON, INDIANA 46064

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS SR.
PLAINTIFF

VS. CAUSE NO. _____

GORDON H. FAULKNER;
INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS
COMMISSIONER INDIANA
DEPARTMENT OF CORRECTION

EDWARD L. COHN, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY
AS SUPERINTENDENT, INDIANA
STATE REFORMATORY

CRAIG A. HANKS, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY
AS ASSISTANT SUPERINTENDENT
OF OPERATIONS, INDIANA STATE
REFORMATORY

DEAN NEITZKE, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY
AS ADMINISTRATOR OF THE
INFIRMARY, INDIANA STATE
REFORMATORY

DR. HAN CHUL CHOI,
INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS MEDICAL
DIRECTOR, INDIANA STATE
REFORMATORY

CIVIL ACTION

THIS IS A CIVIL ACTION AUTHORIZED BY 42 U.S.C. SEC. 1983 TO REDRESS THE DEPRIVATION, UNDER COLOR OF STATE LAW, OF RIGHTS SECURED BY THE CONSTITUTION OF THE UNITED STATES. THE COURT HAS JURISDICTION UNDER 28 U.S.C. SECS. 2201 AND 2202.

PLAINTIFF

PLAINTIFF HARRY LAWRENCE WILLIAMS SR. IS AND WAS AT ALL TIMES MENTIONED HEREIN A PRISONER OF THE STATE OF INDIANA, IN THE CUSTODY OF THE INDIANA DEPARTMENT OF CORRECTION. HE IS CURRENTLY CONFINED IN THE INDIANA STATE REFORMATORY, PENDLETON, INDIANA.

DEFENDANTS

DEFENDANT GORDON H. FAULKNER IS THE COMMISSIONER OF THE DEPARTMENT OF CORRECTION FOR THE STATE OF INDIANA. HE IS LEGALLY RESPONSIBLE FOR THE OVERALL OPERATION OF THE DEPARTMENT AND EACH INSTITUTION UNDER ITS JURISDICTION, INCLUDING INDIANA STATE REFORMATORY.

DEFENDANT EDWARD L. COHN IS THE SUPERINTENDENT OF THE INDIANA STATE REFORMATORY. HE IS LEGALLY RESPONSIBLE FOR THE OPERATION OF INDIANA STATE REFORMATORY AND FOR THE WELFARE OF ALL THE INMATES OF THAT PRISON.

DEFENDANT CRAIG A. HANKS IS THE ASSISTANT SUPERINTENDANT OF OPERATION OF THE INDIANA STATE REFORMATORY. HE IS LEGALLY RESPONSIBLE FOR THE OPERATION OF INDIANA STATE REFORMATORY AND FOR THE WELFARE OF ALL THE INMATES OF THAT PRISON.

DEFENDANT DEAN NEITZKE IS THE ADMINISTRATOR OF THE INFIRMARY AT INDIANA STATE REFORMATORY. HE IS LEGALLY RESPONSIBLE FOR THE MEDICAL PROGRAM OF EACH INMATE OF THAT PRISON.

DEFENDANT DR. HAN CHUL CHOI IS THE MEDICAL DIRECTOR OF THE INDIANA STATE REFORMATORY. HE IS LEGALLY RESPONSIBLE FOR THE OVERALL MEDICAL PROGRAM AND DIAGNOSTIC PRECEPTS AND DISTRIBUTION OF MEDICATIONS TO EACH INMATE OF THAT PRISON.

EACH DEFENDANT IS SUED INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY. AT ALL TIMES MENTIONED IN THIS COMPLAINT EACH INDIVIDUAL ACTED UNDER COLOR OF INDIANA LAW.

FACTS

ON OCTOBER 18, 1985, PLAINTIFF HARRY LAWRENCE WILLIAMS WAS TRANSFERRED TO THE INDIANA STATE REFORMATORY FROM THE INDIANA STATE PRISON. AT THAT TIME PLAINTIFF NOTIFIED THE MEDICAL STAFF OF THE DIAGNOSIS THAT PLAINTIFF HAS A SMALL TUMOR IN THE PINAL REGION OF HIS BRAIN. THE MEDICAL STAFF DISREGARDED THIS INFORMATION AT THAT TIME. ON OCTOBER 19, 1985, PLAINTIFF RETURNED TO THE INFIRMARY AND DISCUSSED THE MATTER WITH PHYSICIANS ASSISTANT STEVE BOWMAN WHO WROTE A MEMORANDUM IN REGARDS TO AND BASED ON THE MEDICAL DOCUMENTS PRESENTED BY THE PLAINTIFF.

AT VARIOUS TIMES WITHIN THE NEXT MONTH THE PLAINTIFF COMPLAINED TO THE MEDICAL STAFF OF DIZZINESS WHICH WAS AGAIN DISREGARDED.

PRIOR TO THANKSGIVING OF 1985, THE PLAINTIFFS CONDITION BEGIN TO GET WORSE SO AT THE NOON HOUR THE PLAINTIFF RETURNED TO G-CELLHOUSE AND REQUESTED TO GO TO THE INFIRMARY. SERGENT LARRY RUDOLF INFORMED THE PLAINTIFF THAT HE WOULD SEE ABOUT GETTING PLAINTIFF TO THE INFIRMARY AFTER THE WORK-LINES AT THE ONE O'CLOCK (1:00) HOUR. PLAINTIFF THEN TALKED WITH COUNSELOR H. McLAUGHLIN AND INFORMED HIM OF PLAINTIFFS NEED TO GO TO THE INFIRMARY AS PLAINTIFF FELT INTOXICATED. COUNSELOR McLAUGHLIN THEN INFORMED SERGENT RUDOLF THAT IT WOULD BE ADVISABLE TO SEND PLAINTIFF TO THE INFIRMARY.

UPON ENTERING THE INFIRMARY PLAINTIFF INFORMED THE MEDICAL TECHNICIANS OF THE CONDITION AND PLAINTIFF WAS REFERRED TO DR. HAN CHUL CHOI. AT THAT TIME LT. JACK BINION ENTERED THE INFIRMARY AND INFORMED THE PLAINTIFF THAT HE WOULD BE PLACED IN ADMINISTRATIVE SEGREGATION FOR BEING INTOXICATED ALTHOUGH THERE WAS NO DETERMINATION THAT PLAINTIFF WAS INTOXICATED.

PLAINTIFF WAS THEN PLACED IN THE INFIRMARY PENDING THE RESULTS OF THE BLOOD TEST THAT WERE TAKEN AFTER THE RESULTS WERE RETURNED THE PLAINTIFF WAS RELEASED FROM THE INFIRMARY AND RETURNED TO G-CELLHOUSE.

PLAINTIFF HAD INFORMED THE MEDICAL PERSONNEL OF THE FACT THAT IT WAS DETERMINED THAT PLAINTIFF IS NOT TO ENGAGE IN A WORK PROGRAM DUE TO THE MEDICAL CONDITION AND PRESENTED A MEDICAL STATEMENT FROM THE MEDICAL PERSONNEL AT THE INDIANA STATE

PRISON IN SUPPORT OF THIS DETERMINATION. SEE: EXHIBITS A & B!

THE CLASSIFICATION/UNIT TEAM BOARD DISREGARDED THESE DOCUMENTS AND COMPELED PLAINTIFF TO ACCEPT A WORK ASSIGNMENT OR TO RECEIVE A CONDUCT REPORT FOR VIOLATING A DEPARTMENT OF CORRECTION RULE (REFUSING A WORK OR PROGRAM ASSIGNMENT, REFUSING TO WORK CODE 160) SEE: EXHIBIT C (ADULT AUTHORITY DISCIPLINARY POLICY PROCEDURES HERE IN AFTER A.A.D.P.P.)

THAT AFTER ACCEPTING THE WORK ASSIGNMENT IN GARMENT MANUFACTURING PLAINTIFF EXPERIENCED FURTHER PROBLEMS WITH HIS EQUILIBRIUM AND DECIDED THAT HE WOULD BE ADVISABLE TO ADHERE TO THE DECISION THAT HE SHOULD NOT ATTEMPT TO WORK. ON OCTOBER 15, 1986, PLAINTIFF INFORMED THE INSTRUCTOR OF HIS DECISION AND WAS SENT BACK TO THE HOUSING UNIT. AT NO TIME WAS THERE A MENTION OF A CONDUCT REPORT BEING ISSUED. THE INMATE CLERK TYPED A CONDUCT REPORT ON THE PLAINTIFF AND THE INSTRUCTOR SIGNED THE REPORT. SEE: EXHIBT D.

AT THE TIME OF BEING NOTIFIED THAT HE WOULD HAVE TO APPEAR BEFORE THE CONDUCT ADJUSTMENT BOARD (C.A.B.) THE PLAINTIFF INFORMED THE SCREENING OFFICER OF THE FACT THAT THE CONDUCT REPORT WAS WRITTEN BY THE INMATE CLERK. LATER ON THE 17TH DAY OF OCTOBER 1986, THE PLAINTIFF SENT A LETTER TO SUPERINTENDENT COHN CONCERNING THIS MATTER WHICH THE SUPERINTENDENT DECIDED TO IGNORE.

ON OCTOBER 21, 1986, THE PLAINTIFF APPEARED BEFORE THE C.A.B. FOR THE CLASS C RULE VIO-

LATION AND WAS DETERMINED TO BE GUILTY AFTER SHOWING THE C.A.B. THE MEDICAL STATEMENTS FROM THE INDIANA STATE PRISON AND THE INDIANA STATE REFORMATORY.

SEE: EXHIBIT E.

ON THE 23RD DAY OF OCTOBER 1986, THE PLAINTIFF WAS TRANSFERRED FROM THE J-CELLHOUSE TO G-CELLHOUSE BECAUSE HE IS NOT WORKING (J-CELLHOUSE IS THE HONOR CELLHOUSE) AND PLACED ON THE HOLD STATUS.

PRIOR TO THE TIME OF THESE EVENTS THE PLAINTIFF NOTIFIED THE OFFICE OF THE ATTORNEY GENERAL THAT HE HAS A CLAIM AGAINST THE STATE OF INDIANA. SEE: EXHIBIT F "NOTICE OF TORT CLAIM",

THAT THERE ARE INDIVIDUALS IN THE J-CELLHOUSE THAT ARE CURRENTLY UNEMPLOYED AND HAVE HELD THIS POSITION FOR FOUR (4) OR FIVE (5) MONTHS BUT THEY HAVE NOT BEEN MOVED (TRANSFERRED) TO G-CELLHOUSE.

THAT AFTER FILING THE NOTICE OF TORT CLAIM WITH THE OFFICE OF THE ATTORNEY GENERAL WITH COPIES TO THE DEFENDANTS, PLAINTIFF WENT TO THE INFIRMARY AND WAS INFORMED THAT DEFENDANT DR. HAN CHUL CHOI MADE A NOTIFICATION IN PLAINTIFFS MEDICAL CHART THAT THE PLAINTIFF WAS CHECKED FOR THE TUMOR ON THE 11TH DAY OF SEPTEMBER 1986. ON THIS DATE THE PLAINTIFF WAS HERE AT THE INDIANA STATE REFORMATORY, GARMENT MANUFACTURING. IT IS IMPOSSIBLE FOR THE CAT SCAN TO HAVE BEEN PERFORMED AT THE INDIANA STATE REFORMATORY BECAUSE THEY DO NOT HAVE THE PROPER FACILITIES TO PERFORM THE REQUIRED TEST. SEE: EXHIBIT G

THAT PRIOR TO THE TIME THAT THE PLAINTIFF FILED THE NOTICE OF TORT CLAIM WITH THE OFFICE OF THE ATTORNEY GENERAL IT WAS BROUGHT TO LIGHT THAT DEFENDANT DR. HAN CHUL CHOI WAS PRACTICING MEDICINE WITH OUT A LICENSE AND HAD BEEN DOING SO SINCE 1984. AS OF THIS TIME THE MEDICAL PERSONAL ARE STILL IGNORING THE TUMOR, THEREBY ENDANGERING THE LIFE OF THE PLAINTIFF.

LEGAL CLAIMS

THAT THE DEFENDANTS BY THEIR ACTS, POLICIES, AND PROCEDURES HAVE VIOLATED PLAINTIFFS RIGHT TO RECEIVE PROPER MEDICAL TREATMENT, A VIOLATION OF THE EIGHTH (8TH) AMENDMENT OF THE UNITED STATES CONSTITUTION.

THAT THE DEFENDANTS BY THEIR ACTS, POLICIES, AND PROCEDURES BY PERMITTING AN UNLICENSED PHYSICIAN TO TREAT OR DISREGARD TREATMENT OF PLAINTIFFS MEDICAL IMPAIRMENT VIOLATE PLAINTIFFS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH (14TH) AMENDMENT OF THE UNITED STATES CONSTITUTION.

THAT THE DEFENDANTS BY THEIR ACTS, POLICIES, AND PROCEDURES BY TRANSFERRING PLAINTIFF WITHOUT A DUE PROCESS CLASSIFICATION HEARING VIOLATED THE PLAINTIFFS RIGHTS AS GUARNATEED UNDER THE FOURTH (4TH) AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

THE PLAINTIFF HAS NO PLAIN, ADEQUATE OR COMPLETE REMEDY AT LAW TO REDRESS THE WRONGS DESCRIBED HEREIN. PLAINTIFF HAS BEEN AND WILL CONTINUE TO BE IRREPARABLY

INJURED BY THE CONDUCT OF THE DEFENDANTS UNLESS THIS COURT GRANTS THE DECLARATORY AND INJUNCTIVE RELIEF WHICH PLAINTIFF SEEKS.

WHEREFORE, PLAINTIFF RESPECTFULLY PRAY THAT THIS COURT ENTER JUDGMENT GRANTING PLAINTIFF:

(1) A DECLARATORY JUDGMENT THAT THE DEFENDANTS' ACTS, POLICIES, AND PRACTICES DESCRIBED HEREIN VIOLATE PLAINTIFFS' RIGHTS UNDER THE UNITED STATES CONSTITUTION.

(2) A PRELIMINARY AND PERMANENT INJUNCTION WHICH:

(A) PROHIBITS THE DEFENDANTS, THEIR SUCCESSORS IN OFFICE, AGENTS AND EMPLOYEES AND ALL OTHER PERSONS IN ACTIVE CONCERT AND PARTICIPATION WITH THEM FROM HARASSING, THREATENING, PUNISHING OR RETALIATING IN ANY WAY AGAINST PLAINTIFF BECAUSE HE FILED THIS ACTION OR AGAINST ANY OTHER PRISONER BECAUSE THAT PRISONER SUBMITTED AFFIDAVITS IN THIS CASE ON BEHALF OF THE PLAINTIFF.

(B) REQUIRES DEFENDANT COHN TO REMOVE FROM PLAINTIFFS' PRISON FILES AND RECORDS ANY REFERENCES TO ANY EVENTS DESCRIBED HEREIN OR TO THE FACT THAT THE PLAINTIFF F.LED THIS ACTION.

(C) REQUIRES DEFENDANTS COHN AND FAULKNER TO ALLOW PLAINTIFF AND OTHER PRISONERS (1) TO ENGAGE IN ANY ORAL OR WRITTEN COMMUNICATION WHICH IS REASONABLY RELATED TO THE CONDUCT OF THIS ACTION, INCLUDING THE PREPARATION OF AFFIDAVITS ON BEHALF OF THE PLAINTIFF.

(3) COMPENSATORY DAMAGES IN THE AMOUNT OF TWO HUNDRED THOUSAND DOLLARS ($200,000) FROM DEFENDANTS DEAN NEITZKE AND DR. HAN CHUL CHOI, AND EACH OF THEM TO PLAINTIFF.

(4) PUNITIVE DAMAGES IN THE AMOUNT OF TWO-HUNDRED-THOUSAND DOLLARS ($200,000) FROM DEFENDANTS FAULKNER, COHN, AND HANKS TO PLAINTIFF HARRY LAWRENCE WILLIAMS SR.

(5) A JURY TRIAL ON ALL ISSUES TRIABLE BY JURY.

(6) PLAINTIFFS' COST OF THIS ACTION.

(7) SUCH OTHER AND FURTHER RELIEF AS THIS COURT DEEMS JUST, PROPER AND EQUITABLE.

I HAVE READ THE FOREGOING COMPLAINT AND HEREBY VERIFY THAT THE MATTERS ALLEGED THEREIN ARE TRUE, EXCEPT AS THE MATTERS ALLEGED ON INFORMATION AND BELIEF, AND AS TO THOSE, I BELIEVE THEM TO BE TRUE.

I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED AT PENDLETON, INDIANA ON THIS 27TH DAY OF OCTOBER 1986.

/s/ Harry Lawrence Williams Sr.

HARRY LAWRENCE WILLIAMS SR.
D.O.C. #21896
INDIANA STATE REFORMATORY
P.O. BOX 30 11-1D
PENDLETON, INDIANA 46064

MEDICAL AUTHORIZATION FOR NON-ROUTINE ACTIVITY

NAME Williams MEMBER 21896

HOUSING D-C-H 8-15 WORK Medical I.S.P.

THIS WILL AUTHORIZE THE ABOVE NAMED INMATE TO: Have an extra pillow -

FROM 1-2-85 TO 1-2-86

THE REASON FOR THIS IS: History of Cardiac arrythmias which are aggravated when in Supine Position.

PHYSICIAN: [signature]

NOTE: THIS MUST BE APPROVED BY THE ASSISTANT SUPERINTENDENT/PROGRAMS PRIOR TO IMPLEMENTATION.

APPROVED: [signature]

DATE: 1/3/85

DISTRIBUTION:

- ☑ INMATE
- ☐ PACKET
- ☐ MEDICAL RECORDS
- ☐ HOUSING UNIT: ____
- ☐ OTHER ____
- ☐ WORK LOCATION
- ☐ COURT DESK
- ☐ FOOD SERVICES
- ☐ LEAD CAPTAIN

MEDICAL AUTHORIZATION FOR NON-ROUTINE ACTIVITY

NAME Williams MEMBER 21896

HOUSING D WORK

THIS WILL AUTHORIZE THE ABOVE NAMED INMATE TO: placed in a medical idle status X 1 year.

FROM 1/2/85 TO 1/2/86

THE REASON FOR THIS IS: A small brain tumor which is affecting his equilibrium. It is very likely that he will have this condition for some time to come

PHYSICIAN:

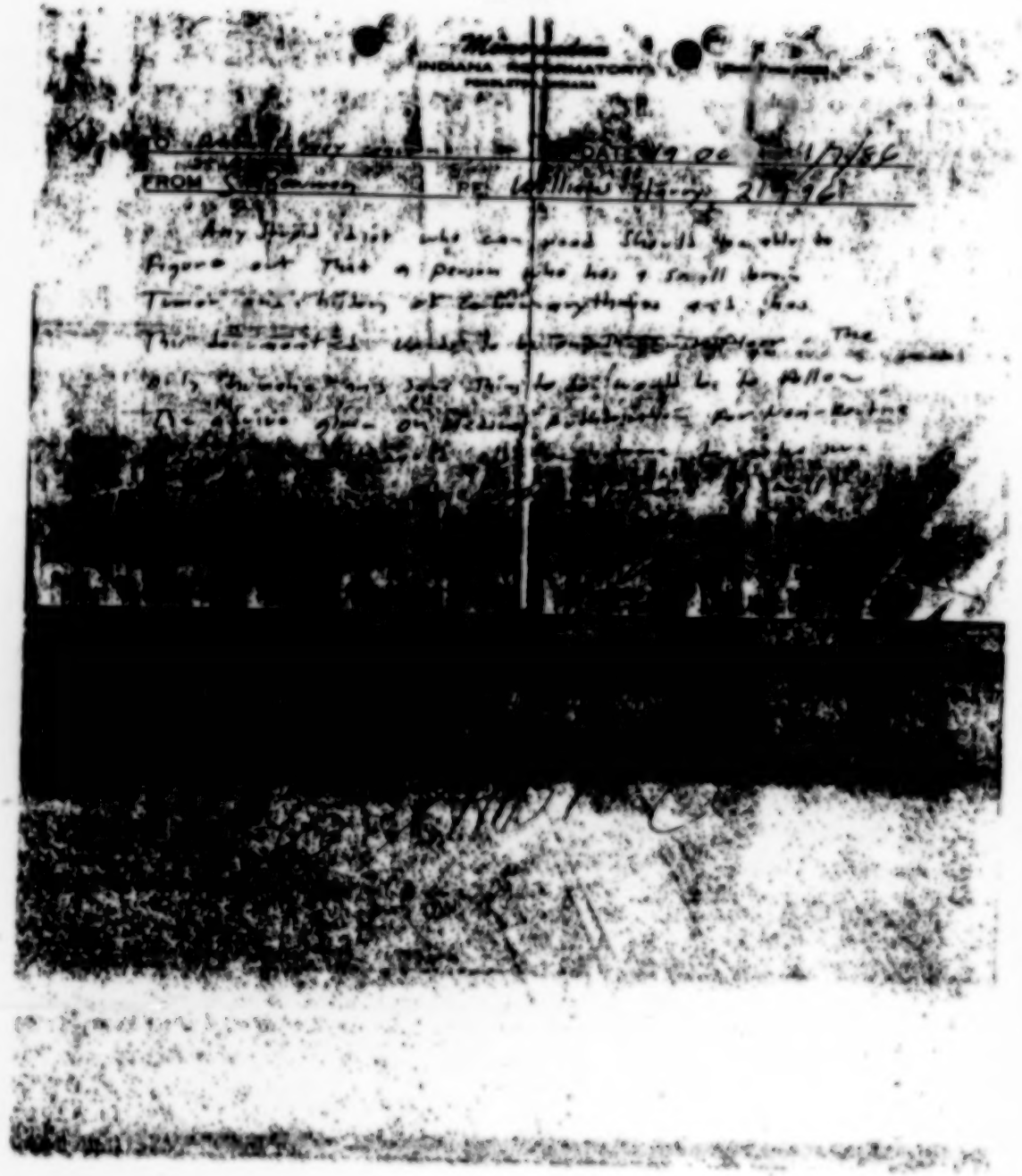
NOTE: THIS MUST BE APPROVED BY THE ASSISTANT SUPERINTENDENT/PROGRAMS PRIOR TO IMPLEMENTATION.

APPROVED:

DATE: 1/7/85

DISTRIBUTION:

- ☑ INMATE
- ☐ PACKET
- ☐ MEDICAL RECORDS
- ☐ HOUSING UNIT: ____
- ☐ OTHER ____
- ☐ WORK LOCATION
- ☐ COUNT DESK
- ☐ FOOD SERVICES
- ☐ LEAD CAPTAIN



CONDUCT REPORT
State Form 39880

INSTRUCTIONS: Type or print clearly. Also see instructions at bottom of page.

Log Number: 1886-10-191

Offender's Name	Offender's Number	Institution	Housing Unit
Williams, Harry L.	21894	Reformatory	19-1J
Date and Time of Incident	**Place of Incident**		**Date Report Written**
10-15-86 appox. 9:35 a.m.	Garment Mfg.		10-15-86
Offense			**Code No.**
Refusing to work or accept a work or program assignment.			160

DESCRIPTION OF INCIDENT

On the above date offender Williams returned from the infirmary at around 9:30 a.m. and informed me in no uncertain terms that he would no longer perform work and that I should find someone else to operate his sewing machine. I attempted to find out what had caused his attitude but he would not elaborate; he merely reaffirmed his decision not to work any longer. Therefore, I had no choice but to send him to his cell so that the other employees would not be affected by his behavior, and I requested the cellhouse officer to place him on hold status pending a C.A.B. hearing on this conduct report.

If more space is needed attach additional sheets or duplicate

Disposition of physical evidence, if any: n/a

Witnesses, if any: n/a

Name of reporting employee: Perdue

Name and title (print): Michael Perdue — Plant Foreman

Signature: M. Perdue

FOR SCREENING OFFICER USE ONLY

Copy of report delivered to offender by: [signature]

Date report delivered: 10-17-86

Signature of offender receiving copy:

Date hold status ordered: 10-17-86

Note to reporting employee: This report is to be filled out in triplicate. All copies are to be forwarded to the Shift Supervisor for review and signature. The Shift Supervisor will then forward all copies to the screening officer.

Distribution: White to offender; Yellow to institution packet; Pink to central office packet

NOTICE OF DISCIPLINARY HEARING
State Form 39880(A)

INSTRUCTIONS: Please type or print clearly.

Offender's Name	Offender's Number	Institution	Housing Unit
Williams, Harry L.	21894	JR	19-1J J.C.H.
Refusing Work Assignment	160	10-15-86	M. Perdue

You are being referred for hearing on the above code violation. You may enter a plea of guilty or not guilty to this offense as indicated below. If you choose to plead not guilty, you will be scheduled to appear for hearing. The following rights shall apply to this hearing:

1. The right to lay representation, in accordance with existing policies and regulations regarding same.
2. The right to request witnesses in your behalf, subject to approval.
3. The right to a fair hearing before impartial decision makers.
4. The right to a minimum of twenty four (24) hours notice prior to appearing on a given charge.
5. The right to present documentary evidence in your behalf.
6. The right to be present at the hearing, except while deliberations are in progress.
7. The right to speak in your own behalf at the hearing. If you choose to remain silent, this silence may not be held against you.
8. The right to a written copy of findings of fact in your case.
9. A guilty finding may result in a drop in credit class and / or loss of previously earned credit time.

If you choose to plead guilty, you are admitting the material allegations and thus waive the right to a lay advocate and witnesses; you appear by yourself for a disposition hearing. If you choose to plead not guilty, you will be scheduled for disposition by the appropriate committee or individual.

My plea of the above cited code is: ☐ Guilty ☑ Not Guilty

Notification Date: 10-17-86 Notified by: [signature] Time / Place: 7:50a Cat Office

I wish to have lay advocate: ☑ Yes ☐ No — Name and number of Advocate: Moon 2617

I wish to call the following witnesses: (Identify name(s) and number(s))

Dr. Peterson WMH
Medical Record
Physicians Asst. S. Bowman

Log Number	Date of Hearing	Type of Hearing		Waive 24 Hour Notice of Hearing
1886-10-191	10-21-86	☑ Adjustment Hearing	☐ Disposition Hearing	

Your case is scheduled for hearing / disposition as noted above. You will appear before the appropriate hearing body on that date, subject to postponement without verbal notice. after 800a J Cat

I have been notified of the above cited code I had against me and have been advised of my rights under due process as enumerated above.

Signature of Witness: [signature] Refused to Sign

Distribution: Original to Offender; Yellow Copy to Offender Packet

DISCIPLINARY HEARI[redacted] REPORT

Case Number: 86-6-191

INSTRUCTIONS: Please type or print clearly

Offender's Name	Offender's Number	Institution	Date of Hearing
Offense	Case No.	Date of Alleged Offense	Plea

Offender's Comment

Decision: ☐ Guilty ☐ Not Guilty Dismissed

Finding of fact and evidence relied upon

If finding is Guilty, the following sanction(s) is / are hereby imposed / recommended:

- ☐ Verbal or written reprimand, specifically
- ☐ Extra work duty, specifically
- ☐ Loss of privileges, specifically
- ☐ Restitution specifically
- ☒ Recommended change in housing / work location, specifically
- ☐ Disciplinary segregation specifically
- ☐ Inter institutional transfer recommendation specifically
- ☐ Recommended credit class (C) Commission / promotion from (C)
- ☐ Reason for sanctions imposed

Effective date	New projected release date	Credit class review date

☐ Earned credit time in Department of Correction to date
Recommended credit time deprivation of days

If the offender has requested any of the optional rights below, but was refused, reasons for refusal must be specified in appropriate space

If lay advocate / witness appear, list name's

Lay Advocate refused / ☐ approved because

☐ Confrontation / cross examination refused / allowed because

Witness(es) ☐ refused / ☐ approved because

Witness(es) or Lay Advocate(s)

I have received a copy of the disposition, rehearing (if any) and my appeal rights. I have the above decision

Inmate Signature

DISTRIBUTION: Original to Institution File

9-11-86

Williams (21896) arrived at Chairmans mtg at 8:23 am then left for the infirmary and returned to the shop at 8:50 a.m.

Exh. D. 16"

Correct
RE Garrett
9/29/86

TO: THE HONORABLE LINLEY PEARSON
ATTORNEY GENERAL OF INDIANA
219 STATE HOUSE
100 NORTH CAPITOL AVENUE
INDIANAPOLIS, INDIANA 46204

RE: ATTACHED NOTICE OF TORT CLAIM

DEAR ATTORNEY GENERAL PEARSON:

I AM TODAY SERVING NOTICE PREPARATORY TO FILING A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA. FILING NOTICE OF TORT CLAIM TO YOUR OFFICE AND THE AUDITOR OF THE STATE OF INDIANA INDIANAPOLIS INDIANA PURSUANT TO I.C. 34-4-16-5-6.

BOTH THIS LETTER AND THE ATTACHED NOTICE OF TORT CLAIM ARE SUBMITTED TO YOUR OFFICE IN THE ORIGINAL FORM AND TO THE TREASURERS' OFFICE BY COPY.

RESPECTFULLY SUBMITTED

/s/ Harry L. Williams

HARRY L. WILLIAMS 21896
INDIANA STATE REFORMATORY
P.O. BOX 30 19-1J
PENDLETON, INDIANA 46064

ENCLOSURE: JOHN OR MARY DOE
AUDITOR STATE OF INDIANA
STATE HOUSE
100 NORTH CAPITOL AVENUE
INDIANAPOLIS, INDIANA 46204

GORDON H. FAULKNER
COMMISSIONER
INDIANA DEPARTMENT OF
CORRECTION

804 STATE OFFICE BUILDING
100 NORTH SENATE AVENUE
INDIANAPOLIS, INDIANA 46204

EDWARD L. COHN
SUPERINTENDENT
INDIANA STATE REFORMATORY
P.O. BOX 28
PENDLETON, INDIANA 46064

CRAIG A. HANKS ASSISTANT
SUPERINTENDENT OF OPERATIONS
INDIANA STATE REFORMATORY
P.O. BOX 28
PENDLETON, INDIANA 46064

DEAN NEITZKE INFIRMARY
ADMINISTRATOR
INDIANA STATE REFORMATORY
P.O. BOX 28
PENDLETON, INDIANA 46064

DR. HAN CHOI FORMER MEDICAL
DIRECTOR
C/O INDIANA DEPARTMENT OF
CORRECTION
804 STATE OFFICE BUILDING
100 NORTH SENATE AVENUE
INDIANAPOLIS, INDIANA 46204

CC: JOE HALLINAN POLICE REPORTER
INDIANAPOLIS STAR & NEWS
307 NORTH PENNSYLVANIA STREET
P.O. BOX 145
INDIANAPOLIS, INDIANA 46206

GENE SLAYMAKER NEWS DIRECTOR
W.T.L.C. RADIO STATION
2126 NORTH MERIDIAN STREET
INDIANAPOLIS, INDIANA 46206

"NOTICE OF TORT CLAIM"

PURSUANT TO THE REQUIREMENT OF THE INDIANA TORT CLAIMS ACT: I.C. 34-4-16-5-1 ET SEQ. HARRY LAWRENCE WILLIAMS; WHOSE PRISON NUMBER IS 21896; GIVES NOTICE THAT HE HAS A CLAIM AGAINST THE INDIANA STATE REFORMATORY; THE COUNTY OF MADISON; STATE OF INDIANA AND AT LEAST BUT NOT LIMITED TO THE FOLLOWING PERSONS WHO HAVE CAUSED AN UNLICENSED PHYSICIAN TO BE IN THE EMPLOY OF THE INDIANA STATE DEPARTMENT OF CORRECTIONS:

A) JOHN OR MARY DOE; TREASURER/AUDITOR STATE OF INDIANA

B) GORDON H. FAULKNER; COMMISSIONER; INDIANA DEPARTMENT OF CORRECTIONS

C) EDWARD L. COHN; SUPERINTENDENT; INDIANA STATE REFORMATORY

D) CRAIG A. HANKS; ASST. SUPERINTENDENT OF OPERATIONS; INDIANA STATE REFORMATORY

E) DEAN NEITZKE; INFIRMARY ADMINISTRATOR; INDIANA STATE REFORMATORY

F) DR. HAN CHOI; FORMER MEDICAL DIRECTOR; INDIANA STATE REFORMATORY AND ANY OTHER RESPONSIBLE PERSON(S) NOT KNOWN TO HIM AND HE ASSERTS THAT:

1) AT THE TIME OF HIS BEING TREATED BY DR. HAN CHOI AND THE DISCOVERY THAT SAID DOCTOR WAS NOT LICENSED BY THE STATE OF INDIANA TO PRACTICE AND PRESCRIBE MEDICATIONS; CLAIMANT WAS/IS A PRISONER OF THE STATE OF INDIANA; INCARCERATED AT THE INDIANA STATE REFORMATORY.

2) AT THE TIME OF THE FILING OF THIS NOTICE OF TORT CLAIM, CLAIMIANT IS CURRENTLY RESIDING AT THE INDIANA STATE REFORMATORY; PENDLETON INDIANA AND HIS DEPARTMENT OF CORRECTIONS REGISTRATION NUMBER IS 21896.

3) THE FOLLOWING IS CLAIMANTS DESCRIPTION OF THE CIRCUMSTANCES THAT LEADS TO THIS NOTICE OF TORT CLAIM:

SINCE HIS ARRIVAL AT THE INDIANA STATE REFORMATORY THE CLAIMANT HAS BEEN TREATED BY DR. HAN CHOI FOR A SEIZURE DISORDER. NOTED ON/IN CLAIMANTS MEDICAL PACKET IS THE FACT THAT CLAIMANT HAS A SMALL TUMOR IN THE PINAL REGION OF HIS BRAIN; THIS DISORDER HAS BEEN TOTALLY IGNORED BY THE MEDICAL PERSONAL AT THE INDIANA STATE REFORMATORY.

AFTER HAVING BOUGHT THIS MATTER TO THE ATTENTION OF THE MEDICAL PERSONAL ON SEVERAL OCCASIONS THE CLAIMANT WAS FINALLY PLACED IN THE INFIRMARY AFTER LT. JACK BINION FOLLOWED THE CLAIMANT TO THE INFIRMARY BECAUSE THE CLAIMANT WAS HAVING A PROBLEM WITH HIS EQUILIBRIM (LT. BINION THREATENED TO PLACE CLAIMANT ON SEGREATION STATUS BECAUSE HE FELT THAT CLAIMANT WAS INTOXICATED). THIS INFORMATION CONCERNING THE MATTER OF THE LOSE OF CLAIMANTS EQUILIBRIM WAS DOCUMENTED INTO CLAIMANTS MEDICAL RECORDS AT THE INDIANA STATE PRISON; WHERE CLAIMANT WAS FIRST SENT BY THE CLASSIFICATION COMMITTEE AT THE RECEPTION-DIAGNOSTIC CENTER. DATE OF DOCUMENTATION: JANUARY 7; 1985.

THIS ISSUE WAS ALSO DOCUMENTED AT THE INDIANA STATE REFORMATORY ON OCTOBER 19 1985

BY PHYSICIANS ASSISTANT STEVE BOWMAN. SEE: EXHIBITS A&B. . . . . SINCE THE INDIANA STATE REFORMATORY HAS NO MEDICAL STATUS THE CLAIMANT IS/HAS BEEN COMPELLED TO ACCEPT A WORK ASSIGNMENT OR TO BE GIVEN CONTINUOUS CONDUCT REPORTS FOR VIOLATING A DEPARTMENT OF CORRECTIONS RULE (CLASS C NUMBER 160 "REFUSING TO WORK OR ACCEPT A WORK OR PROGRAM ASSIGNMENT.")! SEE: EXHIBIT C "ADULT AUTHORITY DISCIPLINARY POLICY PROCEDURES (A.A.D.P.P.) PAGE 39.

AT THE PRESENT TIME THE MEDICAL PERSONAL CONTINUE TO TREAT THE SEIZURE DISORDER AND FAIL TO CHECK ON THE TUMOR TO FIND OUT WHETHER OR NOT IT HAS BECOME MALIGNANT AND THERE ARE STILL TIMES THAT CLAIMANT HAS PROBLEMS WITH HIS EQUILIBRIUM.

BECAUSE OF THE FACT THAT THERE IS NOTHING THAT THE GRIEVANCE COMMITTEE CAN DO TO RECTIFY THIS SITUATION THE CLAIMANT HAS NOT FILED A GRIEVANCE CONCERNING THIS MATTER.

4) AS A RESULT OF THE MALPRACTICE OF THE STATES' NONLICENSED PHYSICIANS ALONG WITH THE POSSIBILITY OF THE TUMOR BEING IN A POSITION TO CAUSE A LOSS OF THE CLAIMANTS LIFE CLAIMANT ASK THE AMOUNT OF TWO-HUNDRED-THOUSAND ($200,000.00) DOLLARS BE PAID TO CLAIMANT.

WHEREFORE; CLAIMANT DEMANDS TWO-HUNDRED-THOUSAND DOLLARS ($200,000.00) AS COMPENSATION FOR THE MENTAL ANGUISH THAT HE HAS HAD TO ENDURE; OR TWO-HUNDRED-THOUSAND DOLLARS ($200,000.00) PLUS COURT COST AND THE LEGAL RATE OF INTEREST FROM THE DATE OF THE ORIGINAL NOTIFICATION IF CLAIMANT IS REQUIRED TO FILE A CIVIL ACTION IN THE UNITED

STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA; INDIANAPOLIS DIVISION.

RESPECTFULLY SUBMITTED

/s/ Harry Lawrence Williams

HARRY LAWRENCE WILLIAMS
#21896
P.O. BOX 30 19-1J
PENDLETON, INDIANA #46064

ENCLOSURES: JOHN OR MARY DOE
AUDITOR STATE OF INDIANA
STATE HOUSE
100 NORTH CAPITOL AVENUE
INDIANAPOLIS INDIANA 46204

GORDON H. FAULKNER;
COMMISSIONER
INDIANA DEPARTMENT OF
CORRECTIONS
804 STATE OFFICE BUILDING
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100 NORTH SENATE AVENUE
INDIANAPOLIS INDIANA 46204

CC: JOE HALLINAN; POLICE REPORTER
INDIANAPOLIS STAR & NEWS
307 NORTH PENNSYLVANIA STREET
P.O. BOX 145
INDIANAPOLIS INDIANA 46206

GENE SLAYMAKER; NEWS
DIRECTOR
W.T.L.C.
2126 NORTH MERIDIAN STREET
INDIANAPOLIS INDIANA 46206

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT A COPY OF THE FOREGOING NOTICE OF TORT CLAIM HAS BEEN SERVED ON THE INDIVIDUALS WHOSE NAMES APPEAR BELOW; BY UNITED STATES MAIL; FIRST-CLASS POSTAGE AFFIXED AND THROUGH INNER INSTITUTIONAL CORRESPONDENCE ON THIS 5TH DAY OF SEPTEMBER 1986 A.D.

/s/ Harry Lawrence Williams

HARRY LAWRENCE WILLIAMS
21896
INDIANA STATE REFORMATORY
P.O. BOX 30 19-1J
PENDLETON INDIANA 46064

ENCLOSURES: JOHN OR MARY DOE
AUDITOR STATE OF INDIANA
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GENE SLAYMAKER; NEWS
DIRECTOR
W.T.L.C.
2126 NORTH MERIDIAN STREET
INDIANAPOLIS INDIANA 46206

To: Mr. Edward Cohn
Superintendent I.S.R.

Fr: Harry Williams

Re: Garnment Mfg.

Dear Mr. Cohn:

This letter is respectfully requesting that you look into the Garnment shop inmate personel activities. Some of the things that are going on up there are as follows:

1. The Inmate Clerk is writing conduct report on inmates, and the Instructors are signing them. Serduc, the clerk wrote one on me and it was witness by each offender that works in that shop. They will all tell you that he wrote the conduct report and not Purdue.

2. For numberous of months, inmates has been complaining about the keeping of the in and out sheet concerning the pay roll, a check of the records will show that Inmate clerk seriduc, was paid for the full month of september and was never docketed, but, a review of the location file up front will show that Seriduc, was on red tag for several days for drugs. How can he get paid for being on red tag when no one else does, especially when he was found guilty by the C.A.B. The Garment Mfg. Payroll clerk need investigating.

Mr. Cohn, also you will find a racial problem in the Garnment Mfg. there are eight (8) Class A jobs in that shop, and there are only two of those A jobs are held by blacks, when there are blacks more qualified for the jobs. You will find a lot of things going on up there that I don't think you would approve of if you knew about them.

/s/ Harry Williams 21896

cc: file

HW/

Memorandum
INDIANA REFORMATORY
PENDLETON, INDIANA

TO Whom it May Concern DATE 5/23/86

FROM Dr. Nam Chul Choi, MD. RE: Williams 21896

Offender Williams, 21896, should be assigned to a work assignment that does not require going up and down stairs, due to medical reasons.

Dr. Nam Chul Choi, MD.
Medical Director

cc: 21896 Med. Packet

EXHIBIT "J"

In the United States District Court
For The Southern District of Indiana
Indianapolis Division

Harry Lawrence Williams Sr.
Plaintiff

vs. Cause No. IP 86-1307-C

Gordon H. Faulkner, et. al
Defendants

Motion To Vacate Judgment

Plaintiff moves in this court for an order pursuant to Rule 60 (b) of the Federal Rules Of Civil Procedure vacating the judgment of this court entered on January 16, 1987, dismissing Plaintiffs complaint. This motion is based on the papers and files in this matter and the memorandum of law attached hereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 26th day of January 19 87 A.D.

/s/ Harry Lawrence Williams Sr.

Harry Lawrence Williams Sr.

In the United States District Court
For The Southern District of Indiana
Indianapolis Division

Harry Lawrence Williams Sr.
Plaintiff

vs. Cause No. IP 86-1307-C

Gordon H. Faulkner, et. al
Defendants

Memorandum Of Law

Comes now the Plaintiff Harry Lawrence Williams Sr., in support of the foregoing motion to vacate judgment and adopts this memorandum of law:

1) The United States Court of Appeals for the second (2nd) Circuit held that a:

> "Charge of deliberate indifference by prison authorities to prisoners request for essential medical treatment is suffucuent to state a claim for relief.

Further this Appeals Court held that:

> "State prisoners complaint which, though devoid of details as to nature of plaintiff's nasal disorder, recited that problem was serious and that no remedial action was taken by prison officials despite their awareness of it was border line, but prisoner should have been afforded opportunity to substantiate it in his action under 1871 civil rights statute. See: *Corby V. Conboy, 457 F. 2d 251 (1972).*

The United States Supreme Court has held that:

> "Deliberate indifference to serious medical needs of prisoners" violates the eighth (8th) amendment proscription against cruel and unusual punishment. See: *Estelle V. Gamble, 429 U.S. 97, 104-05, 97 s. Ct. at 291 (1976) (footnotes omitted).*

The United States Court Of Appeals for the Third (3rd) Circuit held:

"Under the circumstances, however, the district court should not immediately have dismissed the complaint under 28 U.S.C. § 1915 (d). Rather, it should have heeded the advice of the Federal Judicial Center's Prisoner Civil Rights Committee:

> If the court determines that the complaint is frivilous or malicious, but that this defect can be cured by amendment the court should issue an order to show cause why the complaint should not be dismissed. The order should explain why the complaint is frivolous or malicious and should allow the plaintiff an opportunity to respond and to amend the complaint. See: *United States ex rel Walker V. Fayette City, PA., 599 F. 2d 573 (1979).*

The United States District Court, (D. Rhode Island) held:

"Classification is essential to the operation of an orderly and safe prison. It is a prerequisite for the rational allocation of whatever program opportunities exist within the institution. It enables the institution to gauge the proper custody level of an inmate, to identify the inmate's educational, vocational, and psychological needs, and to separate non-violent inmates from the mere predatory. These goals are recognized by state law, which provides that classification shall serve a rehabilitative function. Classification is also indispensible for any coherent future planning. See: *Palmigiano V. Garrahy, 443 F. Supp. 956 (1977): Morris V. Travisono, 310 F. Sup. 857, 865 (D.R.I. 1970).*

This same Court held that:

"Officials who engage in massive, systematic deprivation of prisoners' constitutional rights are entitled to and can expect no deference from federal courts. See: *Palmigiano V. Garrahy, 443 F. Supp. 956 (1977).*

In an appeal before it, the United States Supreme Court stated:

"We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the

"unnecessary and wanton infliction of pain." See: *Gregg V. Georgia, supra, at 182-183, 96 S. Ct. at 2925 (joint opinion).*

Proscribed by the eighth (8th) Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoners needs. See: *Williams V. Vincent, 508 F. 2d 541 (C.A. 2 1974): Thomas V. Pate, 493 F. 2d 151, 158 (C.A. 7), cert. denied sub nom. Thomas V. Cannon, 419 U.S. 879, 95 S. Ct. 143, 42 L. Ed. 2d 119 (1974). Jones V. Lockhart, 484 F. 2d 1192 (C.A.8 1973): Martinez V. Mancusi, 443 F. 2d 921 (C.A. 2 1970), cert, denied, 401 U.S. 983, 91 S. Ct. 1202, 28 L. Ed. 335 (1971).*

or by prison guards in intentionally denying or delaying access to medical care, See: *Westlake V. Lucas, 537 F. 2d 857 (C.A. 6 1976): Thomas V. Pate, supra, 493 F.2d 151, at 158-159; Fitzke V. Shappell, 468 F. 2d 1072 (C.A. 6 1972); Hutchens V. Alabama, 466 F. 2d 507 (C.A. 5 1972); Riley V. Rhay, 407 F. 2d 496 (C.A. 9 1969); Edwards V. Duncan, 355 F. 2d 933 (C.A. 4 1966); Hughes V. Noble, 295 F. 2d 495 (C.A. 5 1961).*

or intentionally interfering with the treatment once prescribed. See. *Wilbron V. Hutto, 509 F. 2d 621, 622 (C.A. 8 1975); Campbell V. Beto, 460 F. 2d 765 (C.A. 5 1972) Martinez V. Mancusi, supra; Tolbert V. Eyman, 434 F. 2d 625 (C.A. 9 1970); Edwards V. Duncan, supra.*

Regardless of how evidenced, deliberate indifference to a prisoners serious illness or injury states a cause of action under § 1983.

Title 42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceeding for redress.

The United States Supreme Court held that:

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. See: *Haines V. Kerner, 404 U.S. 520, 92 S. Ct. 594 (1972). See also: Conley V. Gibson, 355 U.S. 41, 45-34, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); Dioguardi V. Durning, 139 F. 2d 774 (C.A. 2 1944).*

The United States Court Of Appeals, for the Second (2nd) Circuit, in an appeal before them stated:

"Constitutional claim is stated when prison officals intentionally deny access to medical care or interfere with prescribed treatment." See: *U.S.C.A. Const. Amend. 8; Todaro V. Ward, 565 F. 2d 48 (1977).*

This Appeals Court also stated:

Noting that inmates are utterly dependent upon their custodians, the Court was careful to observe that the Eighth (8th) Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which cause perpetuate pain. See: *Todaro V. Ward, 565 F. 2d 48 (1977), supra.*

The United States Court Of Appeals, for the fifth (5th) Circuit, in an appeal before them stated:

"Evidence as to the shortage of qualified medical personal in state penal system, the referral and emergency procedures employed, the shortages in drug supplies, the unavailability of eyeglasses and prosthetic devices, the employment of obsolete medical equipment and techniques, the disorganized lines of therapeutic responsibility, and the glaring unhygienic conditions warranted findings of constitutional inadequacy under either Eighth (8th) Amendment's prohibition against cruel and unusual punishment or the due process clause. See: *U.S.C.A. Const. Amends. 8, 14; Newman V. State Of Alabama, 503 F. 2d 1320 (1974).*

This same Appeals Court stated:

"According to *Estelle V. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), remanded, 554 F. 2d 653 (5th Cir. 1977),* and this Circuit's interpretation of it, to prevail in a § 1983 suit based on cruel and unusual punishment a prisoner must prove that "the conduct in question runs counter to evolving standards of decency or involves wanton infliction of pain."
Bass V. Sullivan, 550 F. 2d 229, 230 (5th Cir. 1977) (interpreting Gamble). At a minimum, the plaintiff must show that prison officals acted with a conscious or callous indifference to his serious medical needs. See: *Fielder V. Bosshard, 590 F. 2d 105 (1979).*

The United States Court Of Appeals, For the Third (3rd) Circuit, in an appeal before them stated:

"The district court characterized these as not factual allegations, but legal conclusions *447 F. Supp. at 419*
In so doing, the court failed to heed the admonition of the Supreme Court that "The Federal Rules Of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. See: *Rannels V. S.E. Nichols, Inc., 591 F. 2d 242 (1979).*

The 1957 Supreme Court instructed that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. See: *Conley V. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957).*

Wherefore, the plaintiff prays this court vacate the judgment entered in this cause and permit him to proceed in forma pauperis and for any and all other relief deemed by this court to be just and proper in these premises.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of January 19 87 A.D. at Pendleton, Indiana.

/s/ Harry Lawrence Williams Sr.

Harry Lawrence Williams Sr.
D.O.C. #21896
Indiana State Reformatory
P.O. Box 30 11-1D
Pendleton, Indiana 46064

In the United States District Court
For The Southern District of Indiana
Indianapolis Division

Harry Lawrence Williams Sr.
Plaintiff

vs. Cause No. IP 86-1307-C

Gordon H. Faulkner, et. al
Defendants

Motion To Amend Information

Comes now the plaintiff Harry Lawrence Williams Sr., pro-se, and moves this court for permission to amend the information here to fore filed in this cause for consideration. In support of this motion he would show the court:

1) That on January 5, 1987, the plaintiff enclosed the original and three (3) copies of the enclosed documents to the court under this cause with a letter requesting that a set of the documents be file marked and returned to the plaintiff for his records.

2) That the plaintiff observed Hugh J. Warnecke, the Law Library Supervisor take the parcels out of the mail box located in the Law Library to be taken to the Mail Room to be mailed on January 5, 1987.

3) That the plaintiff never recieved any of the documents file marked as requested and it appears that the court never recieved the documents as said documents have importance in this cause.

4) That this is not the first (1st) time that there has been a problem with the plaintiffs' mail getting out of this facility to the courts or to other legal organizations.

5) That the plaintiff recently had this same problem with the mail reaching the United States District Court for the Northern District of Indiana at South Bend in a

legal matter that the plaintiff had pending and was under an order of the court to have the documents in the court on a certain date.

6) That the cause was dismissed in the Northern District Court at South Bend because the documents were not in the court on or before the date set by the court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 26th day of January, 19 87 A.D.

/s/ Harry Lawrence Williams Sr.

Harry Lawrence Williams Sr.
D.O.C. #21896
Indiana State Reformatory
P.O. Box 30 11-1D
Pendleton, Indiana 46064

In the United States District Court
For The Southern District of Indiana
Indianapolis Division

Harry Lawrence Williams Sr.
Plaintiff

vs. Cause No. IP 86-1307-C

Gordon H. Faulkner, et. al
Defendants

Affidavit

Harry Lawrence Williams Sr., Hereby declares:

That I am housed in the Detention Cellhouse and cannot recieve adequate medical attention. Each time that I sign the Sick Call Roster my name is overlooked. When I request a pass to the Infirmary for Sick Call I am told that I will recieve a pass for one o'clock (1:00) P.M. and although I remind the officer in charge I'm not allowed to go to the Infirmary. On December 22, 1986, I was advised by a Correctional Sergent to watch myself because someone is out to get me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 24th day of December 19 86 A.D.

/s/ Harry Lawrence Wiliams Sr.

In the United States District Court
For The Southern District of Indiana
Indianapolis Division

Harry Lawrence Williams Sr.
Plaintiff

vs. Cause No. IP 86-1307-C

Gordon H. Faulkner, et. al
Defendants

Affidavit

I /s/ Harry Lawrence Williams do declare that on Friday December 26, 1986 I contacted Counselor Morris Hemmelin in reference to having some legal papers xeroxed so they could be placed into the mail to reach the United States District Court, For the Northern District of Indiana, South Bend Division before the deadline set by the Court of December 29, 1986.

Said Counselor then informed me that there would be a charge of twelve dollars and seventy-five cents ($12.75) to have the documents xeroxed although the Law Library was closed on the 26th day of December, 1986. This Counselor knew that I have no funds as I have been on the "Hold" status since my job assignment was taken in October of 1986. I then requested permission to make an emergency telephone call to family members in order to obtain the funds necessary to have the xeroxing done and said counselor told me he is anti-telephone. I then contacted Correctional Sergent John Floers and requested and recieved the opportunity to speak with the Director of Classification Steve McCauley.

After explaining the situation to Steve McCauley, he then affirmed the decision rendered by Counselor Hemmelin, and as a result of these decisions and the fact that the required documents did not reach the Court in the required time, the action which I had filed in the United States District Court, For the Northern District Of Indiana, South Bend Division will be dismissed with prejudice.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 26th day of December 19 86 A.D.

Respectfully Submitted

/s/ Harry Lawrence Williams Sr.

Harry Lawrence Williams, Sr.
D.O.C. #21870
Indiana State Reformatory
P.O. Box 30 11-1D
Pendleton, Indiana 46064

In the United States District Court
For The Southern District of Indiana
Indianapolis Division

Harry Lawrence Williams Sr.
Plaintiff

vs. Cause No. IP 86-1307-C

Gordon H. Faulkner, et. al
Defendants

Affidavit

I, Harry Lawrence Williams Sr., hereby declare that I am a resident in G-Cellhouse, I have Religious beliefs which I am allowed to practice. I attended the Religious Services held on Christmas Eve with nine (9) other Residents of G-Cellhouse. Prior to being released for the count letter I inquired about being permitted to shower, and it was denied. Upon returning from the count letter, I again inquired about taking a shower. Again it was denied. I was told by Officers Cummings, Fountain D., and Correctional Sergent that by going to practice my religion I forfeited my opportunity to shower. Sergent Rosa stated that his orders came from Correctional Captain C. Black. All of the negatives in G-Cellhouse take place because G-Cellhouse is the detention Cellhouse at Indiana State Reformatory. According to Correctional Sergent Rosa, he has orders not to grant showers to the residents of G-Cellhouse that participate in religious or recreational activities, yet, many of the residents that participated in the recreational program were allowed to shower upon returning from the gym on Christmas Eve.

This type of treatment is a violation of Department Of Corrections Rule # 172 "Failure to follow safety or sanitation Regulations" a Class "D" Offense. See: A.A.D.P.P. (Adult Authority Disciplinary Policy Procedure) Pg. 40.

This is also a violation of Rule #176 "Being unsanitary or untidy, failure to keep one's person or one's quarters in accordance with published standards." See: A.A.D.P.P. Pg. 40.

The other living units permit the residents to shower prior to being released for religious activities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 24th day of December 19 86 A.D.

/s/ Harry Lawrence Wiliams Sr.

Harry Lawrence Williams Sr.

In the United States District Court
For The Southern District of Indiana
Indianapolis Division

Harry Lawrence Williams Sr.
Plaintiff

vs. Cause No. IP 86-1307-C

Gordon H. Faulkner, et. al
Defendants

Affidavit

I, Thomas L. Jones do hereby declare under the penalty of perjury that I am housed in the G-Cellhouse, and being in this detention cellhouse it is impossible for those of us on the Hold Status to recieve adequate, if any medical attention. Also that it is almost impossible for us on the Hold Status to get out of our cells for any purpose other than Meals and Recreation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pendleton Indiana on this 24th day of December 19 86 A.D.

/s/ Thomas L. Jones 862700

In the United States District Court
For The Southern District of Indiana
Indianapolis Division

Harry Lawrence Williams Sr.
Plaintiff

vs. Cause No. IP 86-1307-C

Gordon H. Faulkner, et. al
Defendants

Affidavit

I, Michael Ballard, do hereby declare that I am a resident of G-Cellhouse, and it is almost impossible to recieve any type of assistance because G-Cellhouse is the Detention Cellhouse. Those of us on the Hold Status do not recieve an opportunity to go to the Infirmary and when the Medical Staff enters the Cellhouse they ignore our Request for Medical attention. The only time that those of us on the Hold Status are allowed out of our cells is at Meal times and for Recreation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on the 24th day of December 19 86 A.D.

/s/ Michael Ballard 863906

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,)
Plaintiff,)
)
V.) CAUSE NO. IP 86-1307-C
)
HAN CHUL CHOI, Individually, and)
in his Official Capacity of)
Medical Director, Indiana)
State Reformatory.)
)
DEAN NEITZKE, Individually, and)
in his Official Capacity of)
Infirmary Administrator, Indiana)
State Reformatory.)
Defendants,)

I. JURISDICTION

This is a civil action authorized by 42 U.S.C. sec. 1983 to redress the deprivation, under color of State law, of rights secured by the Constitution of the United States. The Court has jurisdiction under 28 U.S.C. sec. 1343. Plaintiff seeks declaratory relief pursuant to 28 U.S.C. secs. 2201 and 2202.

II. PLAINTIFF

Plaintiff Harry Lawrence Williams is and was at all times mentioned herein a prisoner of the State of Indiana in the custody of the Indiana Department of Corrections. He is currently confined in Indiana State Reformatory, Pendleton, Indiana.

III. DEFENDANTS

Defendant Han Chul Choi is a Physicain employed by the Indiana Department of Corrections who at all times mentioned in this complaint held the position of Medical Director. He is legally responsible for the diagnostic examination and prescription of medications to all the inmates of that prison.

Defendant Dean Neitzke, is an employee of the Indiana Department of Correction at all times mentioned in this complaint he held the position of Administrator of the Infirmary. He was legally responsible for the Medical Programs of the inmates of the Indiana State Reformatory.

Each Defendant is sued individually and in his official capacity. At all times mentioned in this complaint each Defendant acted under the color of Indiana law.

IV. FACTS

On the 18th day of October I was transferred from the Indiana State Prison to the Indiana State Reformatory and upon being admitted I notified the Officer at the Recieving Gate of the fact that I needed to have my medication for seizure control at I had not had any since leaving the State Prison that A.M. I was placed in "G" Cellhouse and in cell 2-4C. At the time the Medical Technician came I informed him of the fact that I have in my possession papers that show that I'm not to be off the ground floor and he recommended that I go to Sick Call on the 19th day of October, 1985. When I went to the Infirmary on the 19th day of October I was interviewed by Physican's Assistant Steve Bowman who after hearing of the problems and reviewing the Medical Authorization forms from the Indiana State Prison wrote a memorandum to the Officer in charge of "G" Cell House. During an examination by Dr. Han Chul Choi on the 21st day of October, 1985, I again produced the Medical Authorization documents and informed Dr. Choi of the fact that I was experiencing trouble with my equilibrium and was at that time moved to the lower range. I informed Dr. Choi of the diagnosis of the tumor in the pinal region of my brain and

there was no further diagnostic evaluation of the tumor. I had been having trouble with seizures which were treated with Phenobarbital and Dilantin, and the Doctors at Wishard Memorial Hospital stated that they feel that the alcohol problem that I suffered prior to incarceration was the cause of the seizures. Dr. Choi failed to take steps to place me on the Medical Idle statis due to the problems that I suffered with my equilibrium. Rather than to make an examination or to place me into the Infirmary until the test could be run, or to place me on the Medical Idle statis I was required to maintain a job in the Garment Manufacturing or to face Disciplinary Proceedings for refusing to work. During this period I was taken to the Infirmary from J Cellhouse due to the problem of my equilibrium, and still required to hold the work assignment at the Garment Manufacturing which required climbing three (3) flights of steps. Prior to being taken to the Infirmary from "J" Cellhouse I was carried back to my Cell (28-6J) by Officer Al Fountain. There has been no form of treatment for the tumor in the Pineal Region of my brain. After having complained a number of times about the dizziness I was experiencing, and having been escorted to the Infirmary by the Custody Staff a number of times I decided that the only way I could get the Medical Staff to pay any attention to my complaints was to quit my work assignment and to recieve the Conduct Report. I went to the Infirmary regarding another matter and noticed that Dr. Choi has written in my Medical Records that I was given a C/T Scan on the 11th day of September, 1986, and the records of the Indiana State Reformatory show that on that date I was in the Garment Manufacturing Plant. The Medical Records show that on January 1, 1984, I could not stand up and the truth is that I was not in the Department of Corrections until the 2nd day of November, 1984. The Medical Records reflect that on the throughout the month of May 1985, I complained of the Medications, headaches, and other problems of a medical nature, yet; the Medical Staff ignored the complaints.

The Medical Records reflect that on the 26th day of November, 1985, I was again escorted to the Infirmary by Custody

officials due to the way I was walking/staggering and appearance of being intoxicated and the evaluation of the Medical Technician on duty read as follows:

B/P 110/78 P. 80 Abnormal gait slightly disoriented

NO SMELL OF ALCOHOL, give etc.

(A) R/O Medicine Toxicity

(P) Custody notified to escort inmate back to Cell Location.

Refer to S/C (Sick Call) 11/27/85 8:30 A.M.

On several occasions I was escorted to the Cell by Officer D. Young due to the unsteadiness of my walk. On the 27th day of November, 1985, while returning to the Cellhouse for the noon count and lunch, I was the only individual on the walks as everyone had returned to their respective housing units and were waiting to go to the Dining Room. When I walked into the Cellhouse I informed Sgt. Larry Rudolf of the fact that I needed to go to the Infirmary, and after arguing with him because of his insistance that I lock-up, I spoke with then Counselor Hal McLaughlin and upon informing him of the problem, he informed Sgt. Rudolf that the wise thing to do would be to get me to the Infirmary. Upon entering the Infirmary, I was informed that I was to be placed in Disciplinary Segregation for being intoxicated, the notification came from Lt. Jack Binion. Rather than to have me placed in the Segregation Unit I was finally admitted to Ward 11 in the Infirmary and on the orders of Dr. Choi I was not given any medication, but there was no other Medical Diagnosis made during that time. In October of 1983, I was admitted to Wishard Memorial Hospital where a by-pass surgery was performed and at that time I was informed of the tumor. Since I've been in the Department of Corrections, I.E. Indiana State Reformatory the Medical Staff has ignored my complaints.

During this period I was required to maintain a work assignment in the Garment Manufacturing Plant, and required to carry bolts of Denim Material up three (3) flights of steps from the truck until I went to the Infirmary on the 23rd day of May,

1985 and entered another comp'aint with Dr. Choi, who at that time wrote a memorandum exempting me from this duty. During this period it had been determined that Dr. Choi was not Licensed to practice nor prescribe medications for the State of Indiana as his License had expired. Please note: All exhibits entered in this matter to date can be found in the original complaint of this cause.

V. LEGAL CLAIMS

That the Defendants acts, policies, and practices have violated the right of the Plaintiff to recieve adequate Medical Care. Such is a violation for the Eighth (8th) Amendment of the United States Constitution.

That the Defendants acts, policies, and practices of ignoring the pleas for Medical Attention and permitting a Physician that is not Licensed by the State to prescribe Medications constitutes "Deliberate Indifference" a violation of the Eighth (8th) Amendment of the United States Constitution.

That the acts, policies, and practices of the Defendants of denying the pleas for Medical Attention of the Plaintiff have violated the Right to due process and equal protection of the laws, a violation of the Fourteenth (14th) Amendment of the United States Constitution.

The Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irrepaably injured by the conduct of the Defendants unless this Court grants the declaratory and injunctive relief which the Plaintiff seeks.

WHEREFORE, the Plaintiff respectfully pray that this Court enter judgment granting the Plaintiff:

(1) A declaratory judgment that the Defendant's acts, policies, and practices described herein violate the Plaintiff's rights under the United States Constitution.

(2) A preliminary and permanent injunction which:

(A) Prohibits the Defendants, their successors in office, agents and employees, and all others in active concert and participation with them form harassing, threatening, punishing or retaliating in any way against the Plaintiff because he filed this action or against any other Prisoner because that Prisoner submitted affidavits in this case on behalf of the Plaintiff.

(B) Requires Defendants Han Chul Choi and Dean Neitzke to cause to have removed from the Plaintiff's Prison files and records any reference to any events described herein or to the fact that the Plaintiff filed this action.

(3) Compensatory damages in the amount of Twenty-Five Thousand Dollars ($25,000.00) from Defendants Han Chul Choi and Dean Neitzke to Plaintiff Harry Larry Lawrence Williams.

(4) Punitive damages in the amount of Twenty-Five Thousand Dollars ($25,000.00) from Defendants Han Chul Choi and Dean Neitzke to Plaintiff Harry Lawrence Williams.

(5) A jury trial on all issues triable by jury.

(6) Plaintiff's cost of this action.

(7) Such other and further relief as this Court deems just, proper and equitable.

I have read the foregoing Complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true.

I certify under the penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 20th day of June 19 88 A.D.

Respectfully Submitted

/s/ Harry Lawrence Williams

Harry Lawrence Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,)
Plaintiff,)
)
V.) CAUSE NO.
) IP 86-1307-C
HAN CHUL CHOI, et. al,)
Defendants,)

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

The Plaintiff moves in this Court for an order permitting him to file this action in forma pauperis without prepayment of fees and cost or security therefor, and appointing Mr. Phillip L. Stewart, 931 S. Rangeline; Carmel, Indiana 66032, a member of the Indiana, to represent the Plaintiff as provided in 28 U.S.C. sec. 1915 (d) and 18 U.S.C. sec. 3006A(g), because, as his attached affidavit indicate, the Plaintiff is unable to pay such cost or give security therefor, and he cannot afford to employ an attorney. This motion is based on the complaint and the affidavit submitted herewith.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 20th day of June 19 88 A.D.

Respectfully Submitted

/s/ Harry Lawrence Williams

Harry Lawrence Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,)
Plaintiff,)
)
V.) CAUSE NO.
) IP 86-1307-C
HAN CHUL CHOI, et. al,)
Defendants,)

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL

I Harry Lawrence Williams declares:

1. I am the Plaintiff in the above-titled action.

2. I believe I am entitled and intend to bring this action in the United States District Court for the Southern District of Indiana against the above-named Defendants.

3. The action seeks to enjoin those Defendants from depriving the Plaintiff of adequate Medical treatment and being treated by unlicensed Physicans and seeks damages in the amount of Fifty Thousand Dollars ($50,000.00) for the deprivation of Plaintiff's civil rights.

4. I believe that I am entitled to the redress sought in this action.

5. I have read and know the contents of the complaint and believe them to be true.

6. I have no assets.

7. Because of my poverty I am unable to pay the cost of this action, to give security therefor, or to employ an Attorney.

I declare under the penalty of perjury that the foregoing is true and correct. Executed at Pendleton, Indiana on this 20th day of June, 19 88 A.D.

Respectfully Submitted

/s/ Harry L. Williams

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,)
Plaintiff,)
)
V.) CAUSE NO.
) IP 86-1307-C
)
HAN CHUL CHOI, *et. al,*)
Defendants,)

ANSWER

Come now the Defendants, Han Chul Choi and Dean Neitzke, by counsel, David A. Nowak, Deputy Attorney General, and in answer to the Amended Complaint filed by Plaintiff herein on or about the 21st day of June, 1988, would state as follows:

1. The Defendants deny the averments made under the heading "I. Jurisdiction".

2. The Defendants admit the averments made under the heading "II. Plaintiff".

3. With respect to the averments made under the heading "III. Defendants":

a) It is admitted that Han Chul Choi was a physician employed by the Indiana Department of Correction at all times relevant to this Complaint but denies all other averments concerning Choi;

b) It is admitted that Dean Neitzke was an employee of the Indiana Department of Correction at all times relevant to this Complaint but denies all other averments concerning Neitzke;

c) Denies all averments not specifically admitted above.

4. With regard to the averments made under the heading of "IV. Facts":

a) The Defendants admit the following averment:

> On the 18th day of October, I was transferred from the Indiana State Prison to the Indiana State Reformatory and upon being admitted I notified the Officer of the Receiving Gate of the fact that I needed to have my medication for seizure control and I had not had any since leaving the State Prison that a.m. I was placed in "G" Cellhouse and in Cell 2-4G. At the time the Medical Technician came I informed him of the fact that I have in my possession papers that show that I'm not to be off the ground floor and he recommended that I go to Sick Call on the 19th day of October, 1985. When I went to the Infirmary on the 19th day of October I was interviewed by Physician's Assistant Steve Bowman who after hearing of the problems and reviewing the Medical Authoriziation forms from the Indiana State Prison wrote a memorandum to the Officer in charge of "G" Cellhouse. During an examination by Dr. Han Chul Choi on the 21st day of October, 1985, I again produced the Medical Authorization documents and informed Dr. Choi of the fact that I was experiencing trouble with my equilibrium and was at that time moved to the lower range. I informed Dr. Choi of the diagnosis of the tumor in the pineal region of my brain . . .

b) The Defendants deny the remainder of the above sentence which states: "and there was no further diagnostic evaluation of the tumor." The Defendants further state that tests were performed which indicated that Plaintiff does not suffer from a pineal tumor.

c) The Defendants admit the following averment:

> I had been having trouble with seizures which were treated by Phenobarbital and Dilantin, and the Doctors at Wishard Memorial Hospital stated that they feel that the alcohol problem that I suffered prior to incarceration was the cause of the seizures.

d) The Defendants admit that Dr. Choi did not place Plaintiff on medical idle status but state that Choi did sign a directive stating that Plaintiff should be assigned to a work assignment that does not require going up and down stairs.

e) The Defendants admit that no treatment for Plaintiff's pineal tumor was provided since tests indicated the lack of any such tumor. The Defendants further state that full treatment was provided for Plaintiff's seizure disorder.

f) The Defendants lack sufficient information to respond to the following allegations and therefore neither admit or deny the averments:

> . . . I was required to maintain a job in the Garment manufacturing or to face Disciplinary Proceedings for refusing to work. During this period I was taken to the Infirmary from "J" Cellhouse due to the problem of my equilibrium, and still required to hold the work assignment at the Garment Manufacturing which required climbing three (3) flights of steps. Prior to being taken to the Infirmary from "J" Cellhouse I was carried back to my cell (28-6J) by Officer Al Fountain. After having complained a number of times about the dizziness I was experiencing, and having been escorted to the Infirmary by the Custody Staff a number of times I decided that the only way I could get the Medical Staff to pay any attention to my complaints was to quit my work assignment and to receive the Conduct Report.

g) The Defendants deny the averment that:

I went to the Infirmary regarding another matter and noticed that Dr. Choi has written in my Medical Records that I was given a CT Scan on the 11th day of September, 1986, and the records of the Indiana State Reformatory show that on that date I was in the Garment Manufacturing Plant.

The Defendants further state Plaintiff obtained a cat-scan on March 15, 1985 and the report of said test dated March 20, 1985 stated: "No evidence for pineal tumor or other abnormalities in the parapineal region identified. Essentially a normal CT scan of the head."

h) The Defendants deny that Plaintiff's medical records show that on January 1, 1984 Plaintiff could not stand up and deny that his records have any entry for said date and admit that he was not in the custody of the Department of Correction on that date.

i) The Defendants admit the averment that:

The Medical Records reflect that throughout the month of May 1985, I complained of the medications, headaches, and other problems of a medical nature, but deny the statement that the medical staff ignored the complaints and state that appropriate treatment and medication was provided. The Defendants further state that on May 22, 1985, Plaintiff was transferred to the Indiana State Prison and the Defendants then lost contact with Plaintiff until he returned to the Reformatory in October of 1985.

j) The Defendants admit the following averments:

The Medical Records reflect that on the 26th day of November, 1985, I was again escorted to the

Infirmary by Custody officials due to the way I was walking/staggering and appearance of being intoxicated and the evaluation of the Medical Technician on duty read as follows:

B/P 110/78 P. 80 Abnormal gait slightly disoriented

NO SMELL OF ALCOHOL, give etc.

(A) R/O Medicine Toxicity

(P) Custody notified to escort inmate back to Cell location.

Refer to S/C (Sick Call) 11/27/85 8:30 a.m..

k) The Defendants lack sufficient knowledge to admit or deny the following averments:

On several occasions I was escorted to the Cell by Officer D. Young due to the unsteadiness of my walk. On the 27th day of November, 1985, while returning to the Cellhouse for the noon count and lunch, I was the only individual on the walks as everyone had returned to their respective housing units and were waiting to go the Dining Room. When I walked into the Cellhouse I informed Sgt. Larry Rudolf of the fact that I needed to go to the Infirmary, and after arguing with him because of his insistance that I lock-up, I spoke with then Counselor Hal McLaughlin and upon informing him of the problem, he informed Sgt. Rudolf that the wise thing to do would be to get me to the Infirmary.

l) The Defendants admit the following averments:

Upon entering the Infirmary, I was informed that I was to be placed in Disciplinary Segregation for being intoxicated, the notification came from Lt. Jack Binion. Rather than to have me placed in

the Segregation unit I was finally admitted to Ward 11 in the Infirmary and on the orders of Dr. Choi I was not given any medication, but there was no other Medical Diagnosis made during that time.

m) The Defendants lack sufficient information to admit or deny the following averment:

In October of 1983, I was admitted to Wishard Memorial Hospital where a by-pass surgery was performed and at that time I was informed of the tumor.

n) The Defendants deny the following averment:

Since I've been in the Department of Correction, i.e., Indiana State Reformatory the Medical Staff has ignored my complaints.

o) The Defendants lack sufficient information to admit or deny the following averment:

During this period I was required to maintain a work assignment in the Garment Manufacturing plant, and required to carry bolts of Denim Material up three (3) flights of steps from the truck . . .

p) The Defendants admit the following averment:

. . . until I went to the Infirmary on the 23rd day of May, 1985 and entered another complaint with Dr. Choi, who at that time wrote a memorandum exempting me from this duty. During this period it had been determined that Dr. Choi was not licensed to practice nor prescribe medications for the State of Indiana as his license had expired.

4. The Defendants deny all averments made under the heading of "V. Legal Claims".

WHEREFORE, the Defendants, by counsel, David A. Nowak, Deputy Attorney General, pray that this Court deny

the relief requested by the Plaintiff, dismiss the Complaint filed herein and for any and all other relief just and proper in the premises.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ David A. Nowak

David A. Nowak
Deputy Attorney General

ADDITIONAL AND AFFIRMATIVE DEFENSES

For further answer to Plaintiff's Amended Complaint, the Defendants would show the Court that:

1. The Defendant, Dean Neitzke, has not been served with a Summons and a copy of the Complaint and therefore this Court lacks jurisdiction over said Defendant. See Defendants' Motion to Dismiss and memorandum in support filed herein on April 27, 1988.

2. That any and all claims against the Defendants in their official capacities are barred due to the provisions of the Eleventh Amendment. *See Rascon v. Hardiman*, 803 F.2d 269, 274 (7th Cir. 1986) citing *Monell v. Department of Social Services*, 436 u.s. 658, 90 n. 55, 98 S.Ct. 2018, 2035 n. 55, 56 L.Ed.2d 611 (1978).

3. That Plaintiff's Amended Complaint is wholly conclusory and fails to state a claim upon which relief can be granted. The Defendant, Han Chul Choi, anticipates the filing of a summary judgment motion, with appropriate supporting documentation, within the next ninety days.

WHEREFORE, the Defendants, by counsel, David A. Nowak, Deputy Attorney General, pray that this Court enter

judgment for the Defendants and against the Plaintiff and for any and all other relief just and proper in the premises.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: /s/ David A. Nowak

David A. Nowak
Deputy Attorney General

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing ANSWER has been duly served upon the party listed below, by United States mail, first-class postage prepaid, on this 1st day of July, 1988:

Mr. Harry Lawrence Williams
DOC #21896
Indiana Reformatory
P.O. Box 30
Pendleton, IN 46064

/s/ David A. Nowak

David A. Nowak
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, IN 46204-2794
Telephone: (317) 232-6325
djk: 6994E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,)
Plaintiff,)
)
v.) CAUSE NO.
) IP 87-1307-C
)
HAN CHUL CHOI, et. al,)
Defendants,)

PLAINTIFF'S RESPONSE TO DEFENDANTS ANSWER TO PLAINTIFF'S AMENDED COMPLAINT

Comes now the Plaintiff, Harry Lawrence Williams, pro se, and without the assistance of counsel, and responds to the Defendants answer to the amended complaint tendered by the Plaintiff, on the 21st day of June, 1988. The Plaintiff would show the Court:

1. That the Defendants admit the averments under the headings of Plaintiff, and Defendants made herein.

2. That the Defendants admit the averments under the section of IV. Facts; subsections (a), (c), (d), (e), (i), (j), (l), and (p).

3. That the Defendants deny the averment under subsections (b), (g), (h), and (n).

4. The Plaintiff contends that the averments admitted by the Defendants show Deliberate Indifference to the serious medical needs of the Plaintff in violation of the Eighth (8th) Amendment of the United States Constitution, as such were added to the State's by reason of the Fourteenth (14th) Amendment.

5. That the Defendant's by their failure to acknowledge issues presented from the medical packet of the Plaintiff, the Defendant's would ask this Court to believe that the records

relied upon to base the amended complaint from are non-existant and the Plaintiff has falsified such information.

6. The Plaintiff intends to present this evidence before the Court at the trial of this cause, when such trial has been scheduled by this Court.

7. That by their admission to the averments under section IV. Facts; the Defendants erroneously interpret the provisions of the Eighth (8th) Amendment of the United States Constitution and ask this Court to agree that the Plaintiff has no rights due to his incarceration.

8. That the United States Court of Appeals for the Seventh Circuit in reviewing an appeal before them on an Eighth (8th) Amendment claim held that: "convicted prisoner's right to be free from cruel and unusual punishment is violated when the jailer refuses to investigate prisoner's cries for help, additionally, right to be free from cruel and unusual punishment is violated if jailers fail to establish adequate patrol procedures; indifference to complaints with substance and known problems violates right to be free from cruel and unusual punishment. See: *Matzker v. Herr*, 748 F. 2d 1142 (7th Cir. 1984).

9. That the Supreme Court of the United States held in an appeal before them that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain. See: *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976).

10. That the Supreme Court also stated that whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. See: *Estelle v. Gamble*, supra at 291-292.

WHEREFORE, the Plaintiff prays that this Court deny the request of the Defendants and grant the relief prayed for in the complaint of the Plaintiff and for any and all other relief deemed just, proper and equitable in these premises.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 19th day of July, 1988 A.D.

Respectfully Submitted

/s/ Harry Lawrence Williams

CERTIFICATE OF SERVICE

I, do hereby certify that a copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANTS ANSWER TO PLAINTIFF'S AMENDED COMPLAINT, has been sent to the individual whose name appears below, via United States Mail, first-class postage affixed on this 19th day of July, 1988 A.D.

Mr. David A. Nowak
Deputy Attorney General
Office of Attorney General
219 State House
100 North Capitol Avenue
Indianapolis, Indiana 46204

/s/ Harry Lawrence Williams

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS, Plaintiff,	)	
vs.	)	CAUSE NO. IP 86-1307-C
HAN CHUL CHOI, Individually, and in his Official Capacity of Medical Director, Indiana State Reformatory, and DEAN NEITZKE, Individually and is his Official Capacity of Infirmary Administrator, Indiana State Reformatory,	)	
Defendants.	)	

JUDGMENT

The Court, having this day filed its Entry in the above matter in the following words and figures, to-wit:

(H.I.)

now, therefore,

IT IS CONSIDERED AND ADJUDGED that plaintiff take nothing by way of his complaint and that this action is hereby DISMISSED.

Dated this 19th day of September, 1988.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. IP 86-1307-C
HAN CHUL CHOI, Individually, and in his Official Capacity of Medical Director, Indiana State Reformatory, and DEAN NEITZKE, Individually and is his Official Capacity of Infirmary Administrator, Indiana State Reformatory,	)	
Defendants.	)	

ENTRY

This cause is before the Court upon *pro se* plaintiff Harry Lawrence Wiliams' tendered amended complaint and on his application to proceed *in forma pauperis* and for appointment of counsel. Also before the Court is a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) filed by defendants Han Chul Choi and Dean Neitzke.

The Court, having read and examined such application, amended complaint, and motion to dismiss, and being duly advised, does hereby deny plaintiff's application to proceed *in forma pauperis* and for appointment of counsel. The Court further GRANTS defendants' motion to dismiss.

IT IS SO ORDERED.

Dated this 19th day of September, 1988.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

MEMORANDUM

I. Introduction

Plaintiff, Harry Lawrence Williams ("Williams") initiated this action on November 7, 1986, when he filed his application to proceed *in forma pauperis* on a tendered complaint as amended and filed pursuant to the provisions of 42 U.S.C. § 1983. Plaintiffs original complaint named as defendants Gordon H. Faulkner, Commissioner, Indiana Department of Correction; Edward L. Cohn, Superintendent, Indiana State Reformatory; Craig A. Hanks, Superintendent of Operations, Indiana State Reformatory; Dean Neitzke, Administrator of the Infirmary, Indiana State Reformatory; and Dr. Han Chul Choi, Medical Director, Indiana State Reformatory.

On January 16, 1987, this Court entered a judgment whereby the original complaint was dismissed. In that judgment, this Court explained that the plaintiff's claims were frivolous and failed to state a cognizable claim pursuant to 42 U.S.C. § 1983.

An appeal was taken to the Seventh Circuit which affirmed the decision in part and reversed in part. The Seventh Circuit reversed the dismissal but only with regard to the medical claims asserted against defendants Choi and Neitzke. The Seventh Circuit made the reversal based on a finding that this Court improperly applied the Rule 12(b)(6) standard to determine if plaintiff's claims were frivolous within the meaning of 28 U.S.C. § 1915. The Court of Appeals found that a complaint can be dismissed as frivolous pursuant to 28 U.S.C. § 1915(d) only if "the petitioner can make no rational argument in law or facts to support his (or her) claim for relief." *Williams v. Faulkner*, 837 F.2d 304, 306 (7th Cir. 1988). Therefore, even though a complaint fails to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), the complaint may contain a rational argument in law or facts which supports a claim for relief. In such a case, the grant of a 12(b)(6) motion would be proper while a *sua sponte* dismissal under 28 U.S.C. § 1915(d) would not. The Seventh Circuit held that the dismissal of plaintiff's Eight Amendment claims as frivolous was improper

because plaintiff had a rational argument for such. However, the dismissal of plaintiff's due process claim was found to be proper because the complaint fails to reveal any rational argument in law or fact to support this claim. *Id.* at 308. The court also found that the complaint was properly dismissed as frivolous as against defendants Hank, Cohn, and Faulkner. Williams alleged no personal involvement on their part, and their positions as Assistant Superintendent (Hanks), Superintendent of the Indiana State Reformatory (Cohn), and as Commissioner of the Indiana Department of Corrections (Faulkner) do not justify any inference of personal involvement in the alleged deprivation of medical care. *Duncan v. Duckworth*, 644 F.2d 653, 656 (7th Cir. 1981); *Boyce v. Alizaduh*, 595 F.2d 948, 953 (4th Cir. 1979). Also, the Court found that recovery against these three defendants cannot be imposed vicariously on a theory of *respondeat superior*. *Williams v. Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988). The Court, therefore, found that dismissal against these three defendants as frivolous was proper. Therefore, this Court currently has before it on remand only plaintiff's Eighth Amendment claims of insufficient medical treatment as asserted against defendants Choi and Neitzke.

II. Complaint

Williams is presently confined at the Indiana State Reformatory in Pendleton, Indiana. On July 7, 1988, Williams filed a renewed complaint naming Choi and Neitzke as defendants which the Court will treat as the amended complaint. Plaintiff claims that the defendants failed to provide plaintiff with proper medical treatment in violation of the Eighth Amendment. Plaintiff seeks a declaratory judgment, preliminary and permanent injunction, compensatory and punitive damages, costs and any other proper relief.

This Court is mindful of its duty to liberally construe *pro se* pleadings drafted by prisoners. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972). In determining the sufficiency of the tendered complaint, we have given the movant "the benefit of the doubt." *McKeever v. Israel*, 689 F.2d 1315, 1322 (7th Cir. 1982).

Nonetheless, even with this liberality accorded movant, the Court finds that his allegations are vague and conclusory and will not suffice to state a claim upon which relief can be granted.

III. Inadequate Medical Treatment

When imposing imprisonment as a punishment for a crime, the state obliges itself to provide persons in its custody with medical care which meets minimal standards of adequacy. The obligation to provide medical care is enforceable as a federal claim since inadequate medical care for prisoners violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Second Circuit has pointed out that the policy of deferring to the discretion of prison officials with regard to prison discipline and security does not usually apply in the context of medical care to the same degree as in other contexts. *Todaro v. Ward*, 565 F.2d 48, 54 (2d Cir. 1977).

Plaintiffs can establish an eighth amendment violation based on insufficient medical care only if they can prove that there has been a "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. at 104. Such "deliberate indifference" can be evidenced by "repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff" or it can be shown by "proving there are such systematic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care." *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted), *cert. denied*, 450 U.S. 1041 (1981).

Plaintiff claims that he had "a small tumor in the pina [sic] region of the brain" when he was transferred to the reformatory. Plaintiff allegedly told the medical staff this and the staff took no action. Plaintiff claims he subsequently complained of dizziness, which the staff also disregarded. Plaintiff states that his condition worsened and he was taken to the infirmary and given a blood test. After receiving the results from the blood test, the medical staff released plaintiff back

into the general population. Plaintiff states he has informed the staff that he had been medically authorized to be placed in idle status due to the brain tumor affecting his equilibrium, but was nonetheless given a work assignment. Plaintiff states that infirmary records show he was checked for the brain tumor on September 11, 1986, but he denies this occrred on that date and furthermore that the office lacks the requisite equipment for such a test. Plaintiff also states that defendant Dr. Choi was practicing medicine without a license during this period.

Both this Court, on initial examination, and the Seventh Circuit, on appeal, found that plaintiff's assertions failed to satisfy the *Estelle* standard by failing to bring forth facts indicating a deliberate indifference to a serious medical need has occurred. The Court of Appeals stated that it agreed with this court "that Williams' eighth amendment allegations fail to demonstrate the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6). *Williams v. Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988). Plaintiff's amended complaint adds nothing further which satisfies the *Estelle* standard.

Plaintiff has not alleged that his tumor is the type which is properly treated with active medical procedures, nor has he alleged that his work assignment has caused him any serious physical injury. Although plaintiff does assert that prison officials did not follow the medical recommendation that plaintiff be placed on idle status, plaintiff has not alleged a sufficiently egregious injury to give rise to what has been termed a "constitutional tort", actionable under 42 U.S.C. § 1983. *See Williams v. Kelly*, 624 F.2d 695 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981); *Ellsworth v. Mockler*, 554 F. Supp. 1072 (N.D. Ind. 1983); *Ricketts v. Derello*, 574 F. Supp. 645 (E.D. Pa. 1983).

IV. Treatment by Unlicensed Physician

Plaintiff's final claim, based on his medical treatment, is that his treatment was performed and supervised by someone practicing medicine without a license, defendant doctor Han Chul Choi. In October of 1984, Dr. Choi's state license to dispense

controlled substances expired. Although his federal license was still valid, Indiana law requires physicians to possess both state and federal licenses. As a result of a subsequent investigation, Dr. Choi's license to practice medicine was suspended from August 30, 1986 to September 5, 1986. The investigation apparently revealed no serious improprieties, and the brief suspension was based solely upon the procedural irregularity of Dr. Choi's state license expiration (Dr. Choi refiled for the state license the day after being formally notified of its expiration.) As the relevant medical treatment took place prior to the suspension, no constitutional liability may be found to arise from Dr. Choi's brief absence from the practice of medicine.

Accordingly, the Court finds that the tendered amended complaint fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. As a result, plaintiff's motion to proceed *in forma pauperis* and for appointment of counsel is DENIED and defendant's motion to dismiss is GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,
Plaintiff,

vs. CAUSE NO.
IP86-1307C

HAN CHUL CHOI, et al.,
Defendants,

MOTION TO VACATE JUDGMENT

The Plaintiff moves in this Court for an order pursuant to Rule 59(e) of the Federal Rules Of Civil Procedure vacating the judgment of this Court, entered on the 19th day of September, 1988, which dismissed the Plaintiffs' complaint and granted the Defendants Motion To Dismiss. This motion is based on the papers and files in this matter and the memorandum of law attached hereto.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 21st day of September, 1988.

Respectfully Submitted

_____

Harry Lawrence Williams
Plaintiff Pro-se

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,
Plaintiff,

vs. CAUSE NO.
IP86-1307C

HAN CHUL CHOI, et al.,
Defendants,

MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO VACATE JUDGMENT

Comes now the Plaintiff, Harry Lawrence Williams, pro se and without the assistance of counsel, and in support of his motion to vacate judgment adopts this memorandum of law. This Court issued its Pre-Trial Scheduling Order in this cause on or about the 13th day of April, 1988. In conjunction with the judgment of the Seventh Circuit judgment of the case at bar, the Defendants have Petitioned the United States Supreme Court for a Writ of Certiorari, which is currently pending.

1. The Plaintiff contends that he has met the burden of establishing the denial of adequate medical treatment as prescribed by the Justices of the United States Supreme Court in the case of *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285 (1976) in that the Plaintiff has shown that the Defendants failed to adequately diagnose the cause of the dizziness experienced by the Plaintiff.

2. That the Defendants admitted the averments listed in the amended complaint filed by the Plaintiff under the section of IV. Facts, specifically, subsections a, c, d, e, i, j, l, and p, such averments containing the fact that the Plaintiff was compelled to climb three (3) flights of steps, when the documents presented by the Plaintiff and later placed in the Medical Packet of the Plaintiff by Defendant Han Chul Choi states that the Plaintiff must remain on the ground floor at all times as the Plaintiff is subject to seizure.

3. The Plaintiff contends that at the time of the filing of this action the Defendants lack the proper machinery to perform the Q/T Boan to determine the extent of the tumor, or to perform any test to determine the existence of a tumor, and as demonstrated in the exhibits listed in the original complaint, the Supervisor of the Garment Manufacturing Shop filed a statement that on the date of the 11th day on September, 1986, the Plaintiff was in the Garment Manufacturing Shop thereby masting the requirement under *Estelle*. Further, the Plaintiff contends that by the Defendants having released him into "general population" after the return of the results of the blood test performed after the constant complaint of the Plaintiff regarding the worsened condition placed his life in jeopardy as the Plaintiff had no control of his equilibrium.

4. The United States Court Of Appeals for the Second (2nd) Circuit held in the case of *Todaro v. Ward*, 565 F. 2d 48 (1977) that a constitutional claim is stated when prison officials intentionally deny access to medical care or interfere with prescribed treatment. The Plaintiff contends that the Defendants violated his Eighth (8th) Amendment right to adequate medical care as it was known by various members of the staff of the Indiana State Reformatory that the Plaintiff was suffering from a loss of his equilibrium and such information was passed on to the Defendants. See: *Estelle v. Gamble*, supra, 429 U.S. at 104-05, 97 S. Ct. 285; *Martines v. Manousi*, 443 F. 2d 921 (2d Cir. 1970) cert. denied, 401 U.S. 983, 91 S. Ct. 1202, 28 L. Ed. 2d 335 (1971); *Corby v. Conboy*, 457 F. 2d 251 (2d Cir. 1972).

5. That during the time of the suffering of the loss of his equilibrium the Plaintiff was informed that he would be held in the Disciplinary Segregation Unit of the Indiana State Reformatory on a charge of intoxication, although the Defendants had prior knowledge of the medical problems of the Plaintiff, rather than to place the Plaintiff in the Infirmary ward for diagnosis of the reasons for the loss of his equilibrium. In the case of *Todaro v. Ward*, 565 F. 2d 48 (1977) the United States Court of Appeals for the Second Circuit held that series of incidents closely related in time may disclose pattern of con-

duct amounting to deliberate indifference to medical needs of prisoners and when systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, court will not hesitate to use its injunctive powers. See also: *Bishop v. Stoneman*, 508 F. 2d 1224 (2d Cir. 1974); *Newman v. Alabama*, 503 F. 2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948, 95 S. Ct. 1680, 44 L. Ed. 102 (1975); *Crus v. Ward*, 558 F. 2d 658, 662 (2d Cir. 1977).

6. The Plaintiff contends that the Indiana State Reformatory was grossly under staffed during the period that the Plaintiff was suffering the loss of his equilibrium as there was a Medical Technician on duty after three o'clock (3:00) P.M. and during this time the Plaintiff went through many of the problems with his equilibrium, as can be noted in the Medical Packet compiled by the Indiana Department of Corrections, and which/such medical packet contains portions of the Plaintiffs Medical History compiled by Wishard Memorial Hospital.

WHEREFORE, the Plaintiff prays that this Court vacate the judgment entered in this cause on or about the 19th day of September, 1988, and for all other relief just and proper in the promises.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed at Pendleton, Indiana on this 21st day of September, 1988.

Respectfully Submitted

_____

Harry Lawrence Williams
Plaintiff Pro se

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing MOTION TO VACATE JUDGMENT AND ATTACHED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE JUDGMENT has been sent to the individual whose name appears below, via United States Mail, first-class postage affixed on this 21st day of September, 1988.

Mr. Linley E. Pearson, esq.
Attorney General Of Indiana

Office of Attorney General
219 State House
100 North Capitol Avenue
Indianapolis, Indiana 46204

_____

Harry L. Williams

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

HARRY LAWRENCE WILLIAMS,	)	
Plaintiff,	)	
vs.	)	CAUSE NO. IP 86-1307-C
HAN CHUL CHOI, Individually, and in his Official Capacity of Medical Director, Indiana State Reformatory, and DEAN NEITZKE, Individually and is his Official Capacity of Infirmary Administrator, Indiana State Reformatory,	)	
Defendants.	)	

ENTRY

This cause is before the Court on plaintiff's motion to vacate judgment dismissing plaintiff's claim dated September 19, 1988. This Court notes that on January 12, 1988, the United States Court of Appeals for the Seventh Circuit remanded this case based upon its finding that this Court improperly dismissed the action as frivolous under 28 U.S.C. § 1915(d). *Williams v. Faulkner*, 837 F.2d 304 (7th Cir. 1988). The Seventh Circuit further stated that although plaintiff's complaint could not be dismissed as frivolous, it did not state a claim sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Id.*

Accordingly, on remand, defendants filed an answer along with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This Court concluded plaintiff failed to state a claim upon which relief could be granted and entered its judgment dismissing plaintiff's complaint of September 19, 1988.

Unknown to the Court at the time of its judgment, defendants had filed a notice of appeal with the Seventh Circuit on

May 12, 1988 and on May 16, 1988, had filed their petition for writ of certiorari with the Supreme Court of the United States. The Supreme Court subsequently granted certiorari on October 3, 1988.

The jurisdiction of the Supreme Court attaches upon the timely filing of a notice of appeal. *United Public Workers v. Mitchell*, 330 U.S. 75, 84-86 (1947). Consequently, since defendants' notice of appeal was timely filed (*see* 28 U.S.C. § 2101(c)), this Court had no jurisdiction to entertain defendants' motion to dismiss.

Accordingly, the Court finds it lacked jurisdiction to enter the judgment dated September 19, 1988 dismissing plaintiffs complaint. Therefore, the judgment is hereby VACATED and this matter is STAYED pending final disposition of defendants' appeal by the Supreme Court.

IT IS SO ORDERED.

Dated this 14th day of November, 1988.

/s/ Sarah Evans Barker

SARAH EVANS BARKER, Judge
United States District Court
Southern District of Indiana

PLAINTIFFS	DEFENDANTS
WILLIAMS, SR., HARRY LAWRENCE	FAULKNER, GORDON H., Individually and in his official capacity as Commissioner Indiana Dept. of Correction COHN, EDWARD L., individually and in his official capacity as Superintendent Indiana State Reformatory HANKS, CRAIG A., individually and in his official capacity as Assistant Superintendent of Operations, Indiana State Reformatory NEITZKE, DEAN, individually and in his official capacity as Administrator of the Infirmary Indiana State Reformatory DR. HAN CHUL CHOI, Individually in his official capacity as Administrator of the infirmary, Indiana State Reformatory
Prisoner — civil rights	

ATTORNEYS

Pro Se #21896 Indiana Reformatory P.O. Box 30, 11-10 Pendleton, Ind. 46064	DAVID A. NOWAK Deputy Attorney General 219 State House Indpls., Ind. 46204 (317) 232-6325 attorney for Dr. Han Chul Choi and Dean Neitzke.

DATE	PROCEEDINGS
11/7/86	Application to proceed in forma pauperis and certificate of accounts available filed.
12/1/86	Affidavit of Harry Williams.
12/8/86	Affidavit of Carrie Douglas.
12/15/86	Plaintiff files Motion to amend, c/s
12/16/86	Affidavit of Terry Seriduc
1/16/87	Court files entry stating that plaintiff take nothing by way of his complaint and that said complaint is hereby dismissed. c/m CASE CLOSED (E.O.D. 1/23/87)
1/28/87	Plaintiff files Motion to vacate Judgment; Memorandum of law; affidavit.
3/11/87	Court entry. Plaintiff's motion for appointment of counsel is denied. Plaintiff's motion to vacate judgment is Denied. cm
3/16/87	Plaintiff files notice of appeal to the United States Court of Appeals for the Seventh Circuit from the orders of Jan. 16, 1987 and March 11, 1987. Copy of the notice of appeal sent to the court reporter and the attorneys of record. Copy of the notice of appeal, docket entries, information sheet, orders sent to the court of appeals. Filing fees not paid.
3/23/87	Appeal docketed in the court of appeals on March 18, 1987. Assigned number 87-1417.
3/26/87	Plaintiff files: 1) Motion for leave to proceed in forma pauperis and for appointment of counsel. 2) Affidavit in support, c/s.
4/13/87	Court entry. March 16, 1987 motion for leave to proceed in forma pauperis and for appointment of counsel on appeal is Denied. cm Copy mailed to the court of appeals.

4/27/87	Record on appeal consisting of one volume pleading forwarded to the court of appeals pursuant to the court of appeals written request.
2/29/88	Certified copy of Judgment received from Court of Appeals dated January 1988. Judgment of District court is AFFIRMED IN PART, REVERSED IN PART, case is REMANDED. 1 volume of pleadings received.
2/24/88	CASE REOPENED
3/14/88	GRANTS pauper status as to Dr. Choi and Dean Neitzke. Summons issued. Sent to Marshal for service.
3/21/88	PLAINTIFF: (1) Motion for order compelling discovery.c/s
3/31/88	U.S. MARSHAL RETURN — Pltf. — Summons & Complaint — Cert. Mail.: 1) Indiana State Reformatory — 3/21/88 — Han Chul Choi, etal. 2) Dean Neitzke — Unexecuted.
4/13/88	PLAINTIFF: (1) Affidavit for entry of default c/s
3/31/88	DENIES pltf's Motion for Order Compelling Discovery, Pltf has not complied with Rule 13. c/m (JPE)
4/13/88	ISSUES Scheduling Order. (JPE)
4/19/88	PLAINTIFF: (1) Motion for Default. (against defts. Han Chul Choi and Dean Neitzke)
4/25/88	PLAINTIFF: (1) Affidavit for extension of time c/s
4/27/88	PLAINTIFF: (1) Motion for an order compelling discovery.c/s (2) Motion to amend c/s

4/27/88	DEFENDANTS, DEAN NEITZKE AND DR. HAN CHUL CHOI: (1) Motion to Dismiss. c/s (2) Memorandum in support of Motion to dismiss. c/s (3) Response to pltfs. motion for defautlt c/s (4) Appearance by David A. Nowak, Deputy Atty. General.
5/2/88	PLAINTIFF: (1) response to defts. motion to dismiss. c/s
5/3/88	DENIES Pltfs Motion for Order to Compel Discovery. c/m (JPE) DENIES Pltfs Motion to Amend. c/m (JPE) DENIES Pltfs Motion for Extension of Time. c/m (JPE)
5/6/88	DENIES Pltfs Motion for Default. c/m (JPE)
5/16/88	PLAINTIFF: (1) motion for an order compelling discovery, c/s.
5/17/88	DEFENDANTS: (1) preliminary list of witnesses, c/s.
5/24/88	DEFENDANTS: 1) Response to motion for an order compelling discovery. c/s
6/6/8	PLAINTIFF: (1) Preliminary list of witnesses. c/s
6/8/88	PLAINTIFF: (1) Motion for enlargement of time c/s
6/10/88	GRANTS Plft's Motion for Enlargement of Time to Amend Complaint to & including. JPE
7/1/88	DEFENDANTS, Han Chul Choi and Dean Neitzke: (1) Answer. c/s.

7/7/88	PLAINTIFF: (1) Motion for leave to proceed in forma pauperis & appt. of counsel. (2) Affidavit in support of motion to proceed in forma pauperis. (3) Complaint.
7/20/88	PLAINTIFF: (1) Response to defts. answer to pltfs. amended complaint c/s
8/1/88	DEFENDANTS: (1) Preliminary list of exhibits c/s
8/17/88	DEFENDANTS: (1) preliminary list of exhibits c/s
9/19/88	ENTRY, MEMORANDUM IN SUPPORT and JUDGMENT. Application to proceed in forma pauperis and for appointment of counsel are DENIED. Motion to dismiss is GRANTED. CAUSE DISMISSED. c/m. (EOD 9/21/88) (cc)
9/26/88	PLAINTIFF; (1) Motion to vacate Judgment. c/s
11/3/88	Pursuant to phone call from Seventh Circuit Court of Appeals, this action is on appeal in the U.S. Supreme Court, Cause Numbver 87-1 (filed May 12, 1988)
11/14/88	Judgment VACATED and this matter is STAYED pending final disposition defendant's appeal by the Supreme Court. (EOD 11/14/88)
11/14/88	Record on Appeal consisting of 1 volume of pleadings forwarded to U.S. Supreme Court pursuant to written request.
11/14/88	ENTERS order vacating judgment of September 19, 1988, for lack of jurisdiction and STAYS further action in this cause pending final disposition of defendant's appeal by United States Supreme Court. c/m (EOD 11/16/88) CC

11/21/88	U.S. Supreme Court returns receipt of 1 volume of pleadings. Received in Supreme Court on 11/17/88. Cause Number 87-1882.

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-1882

IN THE

Supreme Court of the United States

October Term 1988

DEAN NEITZKE, Individually and in his official capacity as Administrator of the Infirmary, Indiana Reformatory, and DR. HAN CHUL CHOI, Individually and in his official capacity as Medical Director, Indiana State Reformatory,

Petitioners,

vs.

HARRY LAWRENCE WILLIAMS, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether a case that fails to state a claim under Federal Rules of Civil Procedure 12(b)(6) automatically meets the "frivolous" standard under 28 U.S.C. 1915(d). The Seventh Circuit here held it does not. This is contrary to the rule in the Second, Third, Fourth, Sixth, Eighth, Ninth and Eleventh Circuit Courts of Appeals.

LIST OF PARTIES

The Plaintiff-Respondent, Harry Lawrence Williams, Sr., is an inmate incarcerated at the Indiana State Reformatory.

The Defendants-Petitioners include Dean Neitzke, the Administrator of the Infirmary at the Indiana Reformatory, and Dr. Han Chul Choi, the Medical Director at the Indiana Reformatory.

The District Court's dismissal of all other Defendants was affirmed by the United States Court of Appeals for the Seventh Circuit. These individuals include Gordon H. Faulkner, Commissioner of the Indiana Department of Correction, Edward L. Cohn, Superintendent of the Indiana State Reformatory, and Craig A. Hanks, Assistant Superintendent of the Indiana State Reformatory.

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No. 87-1882

IN THE

Supreme Court of the United States

October Term 1988

DEAN NEITZKE, Individually and in his official capacity as Administrator of the Infirmary, Indiana Reformatory, and DR. HAN CHUL CHOI, Individually and in his official capacity as Medical Director, Indiana State Reformatory,

Petitioners,

vs.

HARRY LAWRENCE WILLIAMS, SR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

The Petitioners respectfully pray that the Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) which reversed and remanded this case to the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter District Court).

OPINIONS BELOW

The decision of the Seventh Circuit was issued on January 12, 1988. *Williams v. Faulkner*, 837 F.2d 304 (7th Cir. 1988) (J.A. 1). The Seventh Circuit denied Petitioners' petition for rehearing on February 12, 1988 (J.A. 11).

On January 16, 1987, the District Court issued an unreported decision which dismissed Respondent's complaint (J.A. 13). On March 11, 1987, the District Court issued an unreported decision which dismissed Respondent's amended complaint (J.A. 23).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 17 of this Court.

The Seventh Circuit's decision was entered on January 12, 1988 and the Seventh Circuit's order denying Petitioners' petition for rehearing was entered on February 12, 1988. A Petition for Writ of Certiorari was filed by mail on May 12, 1988, prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 20.2. The Petition for Writ of Certiorari was granted on October 3, 1988 and this brief is timely filed in that it is filed prior to the expiration of the forty-five (45) day period allowed by Rule 35.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1915 provides:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes an affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

. An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) Upon the filing of an affidavit in accordance with subsection (1) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted by section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

STATEMENT OF THE CASE

A. Nature of the Case

This Petition arises from a reversal and remand for further proceedings by the Seventh Circuit. This cause concerns a civil rights action filed by an inmate who is confined at the Indiana State Reformatory and who alleged that the medical treatment provided him constituted a violation of the cruel and unusual punishment clause of the Eighth Amendment.

B. Course of Proceedings

This action was initiated on November 7, 1986 when Respondent, Harry Lawrence Williams, Sr. (hereinafter Williams), filed his application to proceed *in forma pauperis* (J.A. 27) and the complaint he proposed to file pursuant to 42 U.S.C. § 1983 (J.A. 31). On January 16, 1987, the District Court entered an order which found that Williams' tendered complaint failed to state a claim under 42 U.S.C. § 1983 (J.A. 13). Therefore, his claims were deemed frivolous within the meaning of 28 U.S.C. § 1915(d) and leave to proceed *in forma pauperis* was denied and the complaint dismissed.

On January 28, 1987, Williams filed a motion to vacate judgment and motion to amend information (J.A. 54 & 60). On March 11, 1987, the District Court reaffirmed its order of January 16, 1987 and once again found that Williams' complaint was frivolous and failed to state a cognizable claim pursuant to 42 U.S.C. § 1983 (J.A. 23).

On January 12, 1988, the Seventh Circuit reversed the District Court and remanded the cause for further proceedings (J.A. 1). The Seventh Circuit agreed with the District Court by finding that the complaint failed to state a claim upon which relief could be granted, but reversed the denial of pauper status by holding that a complaint which fails to state a claim is not necessarily frivolous within the meaning of 28 U.S.C. § 1915. Neitzke and Choi's petition for rehearing was denied on February 12, 1988 (J.A. 11).

On May 12, 1988, Petitioners timely filed their Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and said Petition was granted by this Court on October 3, 1988.

C. Facts Material to the Consideration of the Question Presented

The question presented herein is purely legal. Both the District Court and the Seventh Circuit found that Williams' complaint failed to state a claim upon which relief could be granted pursuant to 42 U.S.C. § 1983. The only issue raised is whether such a complaint is necessarily frivolous pursuant to 28 U.S.C. § 1915(d).

SUMMARY OF THE ARGUMENT

A *pro se* complaint which fails to state a claim upon which relief can be granted is, as a matter of law, frivolous within the meaning of 28 U.S.C. § 1915(d). Both the District Court and the Seventh Circuit concluded that Williams' complaint failed to allege sufficient facts to state a claim. Therefore, there can be no rational argument in law or fact to support Williams' claim; thus, requiring the District Court to grant pauper status serves no purpose.

ARGUMENT

A COMPLAINT WHICH FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO 42 U.S.C. § 1983 IS FRIVOLOUS WITHIN THE MEANING OF 28 U.S.C. § 1915(d)

Williams' complaint was brought into federal court under the auspices of 28 U.S.C § 1915, which authorizes federal courts to entertain actions *in forma pauperis* in an effort to assure "that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal 'in any court of the United States' solely because his poverty makes it impossible for him to pay or secure the costs." *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 342, 69 S.Ct. 85, 90, 93 L.Ed.43 (1948). At the same time that it sought to lower judicial access barriers to the poor, Congress was also concerned that opening the courthouse doors at no cost might lead to a flood of insubstantial or malicious lawsuits. In response to this concern, Congress included in Section 1915 a provision allowing early dismissal of those claims which "the court . . . is satisfied [are] frivolous or malicious." 28 U.S.C. § 1915(d); *Brandon v. District of Columbia Board of Parole*, 734 F.2d 56, 58 (D.C. Cir. 1984).

At least as a partial result of the authorization to sue under 28 U.S.C. § 1915(d) without prepayment of fees, federal courts are now facing a barrage of civil rights complaints filed by prisoners. The numbers of such suits have risen from 218 in 1966 to 18,034 in 1984 to 20,842 in 1986. *Harris v. Menendez*, 817 F.2d 737, 738 (11th Cir. 1987), citing the Annual Report of the Director of the Administrative Office of the United States Courts for the Twelve Month Period ending June 30, 1984, at 142-143 and Annual Report of the Director of Administrative Office of the United States Courts for the Twelve Month period ending June 30, 1986, Appendix I. at 21.

The real problem with this substantial increase in prisoner litigation is that many cases which are filed are truly frivolous and do not deserve the attention of the federal courts. As the Fifth Circuit recognized:

> Unlike most litigants, prisoners have everything to gain and nothing to lose by filing frivolous lawsuits. Filing a suit *in forma pauperis* costs a prisoner little or nothing; time is usually of little importance to a prisoner and prisoners are not often deterred by the threat of possible sanctions for malicious or frivolous actions or perjury. Moreover, a prisoner, while he may be unsuccessful, can at least look to a "short sabbatical in the nearest federal courthouse." *Cruz v. Beto*, 405 U.S. 319, 327, 92 S.Ct. 1079, 1084, 31 L.Ed.2d 263, 271 (1972) (Rehnquist, J., dissenting). Thus, the temptation to file frivolous or malicious suits is strong, and these suits clutter up the federal courts, wasting scarce and valuable resources, subjecting prison officials unnecessarily to the burdens of prison litigation and preventing prisoner suits with merit from receiving adequate attention.

Green v. McKaskle, 788 F.2d 1116, 1119-1120 (5th Cir. 1986).

Even the Seventh Circuit, whose decision is challenged by this proceeding, has recognized this problem as follows:

> . . ., that section (§ 1915) embodies a delicate balance between access to the courts and the need to curb the abuses necessarily associated with *in forma pauperis* litigation. On the one hand, the right to proceed *in forma pauperis* ensures that a indigent litigant has meaningful access to the federal justice system. At the same time, though, the Congress has recognized that the litigant who takes advantage of this manner of proceeding, unlike his nonindigent counterpart, is not subject to the same economic disincentives to filing frivolous, malicious or repetitive lawsuits. . . . These improperly taken suits can clog the courts and reduce the capacity of the entire system to deal effectively with truly meritorious claims.

Jones v. Morris, 777 F.2d 1277, 1279 (7th Cir. 1985).

Every component of the federal court system has suffered as a result of this flood of frivolous litigation. The federal courts have been unable to use their scarce resources effectively and efficiently because of the demands placed on the courts by frivolous prisoner litigation. State officials have been required to bear the burden of frivolous and malicious litigation. Even prisoners with valid and meritorious claims have suffered because the time spent on frivolous lawsuits has deprived the courts of the time, energy and inclination to give meritorious claims the attention they deserve.

> "As one commentator noted several years ago, '[the] upsurge of [IFP proceedings] is said to threaten both efficient judicial administration and the achievement of justice in individual cases, creating the possibility that judges will not be able to identify the meritorious case in the flood of those deemed frivolous.' *Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 611 (1979) The predicted possibility is now common fact."

Green v. McKaskle, 788 F.2d 1116, 1120 (5th Cir. 1986).

In response, the federal courts have relied upon the protection of 28 U.S.C. § 1915(d), which authorizes the early dismissal of those claims which the court is satisfied are frivolous or malicious. Furthermore, dismissal of such complaints should occur as soon as possible. In *Boyce v. Alizaduh*, 595 F.2d 948 (4th Cir. 1979), the court cited the "Recommended Procedures

of Handling Prisoner Civil Rights Cases in the Federal Courts" (Federal Judicial Center, Tentative Report no. 2, 1977) as follows:

> The committee recommends that the decision whether to dismiss pursuant to § 1915(d) be made prior to the issuance of process. In this way the defendant will be spared the expense and inconvenience of answering a frivolous complaint.
>
> The committee recommends dismissal with no opportunity to respond when the complaint is irreparably frivolous or malicious. If the defect in the complaint is reparable, the court should issue an order to show cause, permitting the plaintiff to respond and to amend. If there are multiple defendants, the complaint should be dismissed as to those defendants against whom a frivolous or malicious cause of action is alleged and should be allowed to continue against the other defendants. In borderline cases the court should not dismiss, but should let the case proceed and rule on a subsequent motion to dismiss if one is presented.

In the instant case, the District Court found that Williams' complaint (J.A. 31) failed to state a claim upon which relief can be granted and dismissed the cause prior to issuance of process. The court issued a written decision explaining the deficiencies in the complaint (J.A. 13). Williams was then allowed to amend his complaint (J.A. 60) and this amended complaint was also dismissed for failure to state a claim (J.A. 23). The Seventh Circuit agreed with the District Court's determination that the complaints failed to state a claim upon which relief can be granted. *Williams v. Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988) (J.A. 1, at 7). Nevertheless, the Seventh Circuit held that the fact that a *pro se*, *in forma pauperis* complaint fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) does not, in and of itself, warrant the *sua sponte* dismissal of a case as frivolous under § 1915(d) (J.A. 1, at 6).

In so doing, the Seventh Circuit erroneously relied upon the conclusion of the D.C. Circuit as announced in *Brandon v.*

District of Columbia Board of Parole, 734 F.2d 56 (D.C. Cir. 1984). The *Brandon* court held:

> According, we hold that a complaint need not indisputably state a cause of action to survive *sua sponte* dismissal; instead, if the complaint has at least an arguable basis in law and fact — if the complaint is viable — it cannot be deemed frivolous.

Id., at 59. The *Brandon* court concluded that it was "sufficiently possible that the claim (Brandon's complaint) could state a cause of action." *Id.*, at 61. In the instant case, both the District Court and the Seventh Circuit determined that Williams' complaint failed to state a claim.

Furthermore, the *Brandon* court was concerned that a premature dismissal would cut short the normal course of litigation through which a *pro se* litigant could establish a cause of action. In *Brandon*, the court recommending the issuance of process followed by "the filing of an answer by the government followed by a response from Brandon in which he sought to establish that a cause of action was stated under the facts of his case or to amend his complaint so it did state a cause of action." *Id.*, at 61. In the instant case, the District Court allowed the opportunity which was lacking in *Brandon*. The District Court issued a detailed decision explaining why Williams' complaint failed to state a claim and then allowed an amendment to Williams' complaint. The amended complaint also failed to state a claim and pauper status was therefore denied.

Due to its erroneous reliance on *Brandon*, the Seventh Circuit required the issuance of process and an answer or motion from the Defendants prior to any dismissal of the cause. This decision is erroneous and in conflict with the decisions of a majority of the circuits.

The Fifth Circuit has instructed their district courts to do exactly what the Seventh Circuit is prohibiting in this case. In *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), that Court of Appeals concluded that "the standard for determining the legal sufficiency of a complaint is the same under either Fed. R. Civ.

P. 12 or 28 U.S.C. § 1915(d)." *Id.*, at 182. The Fifth Circuit then instructed their district courts as follows:

> We must take advantage of every tool in our judicial workshop. The district courts should use with greater frequency the device of referring prisoners' cases to magistrates for § 1915 determination and for Rule 12(b)(6) review of specific claims. To do so will not be adverse to meritorious prisoners' claims. To the contrary, limited judicial resources might then be utilized more timely and more efficaciously to resolve those cases in which relief should be granted.

Id., at 182. *Accord*, *Green v. McKaskle*, 788 F.2d 116 (5th Cir. 1986); *Coy v. Estelle*, 789 F.2d 318 (5th Cir. 1986); *Montana v. Commissioners Court*, 659 F.2d 19 (5th Cir. 1981).

In *Harris v. Menendez*, 817 F.2d 737 (11th Cir. 1987), the Eleventh Circuit expanded a determination by the Fourth Circuit which held that the standard for determining whether a suit is frivolous is the same as that for dismissing a case under Rule 12(b)(6). The Eleventh Circuit stated:

> We note that some circuits have overlooked the reasons for the liberal grant of discretion in IFP cases and have held that the standard for determining when a suit is "frivolous" is the same as that for dismissal of a case under Fed. R. Civ. P. 12(b)(6). *See e.g.*, *Boyce v. Alizaduh*, 595 F.2d 948, 951-51 (4th Cir. 1979). This circuit, however, has not merged the two standards, specifically holding that a court's authority to dismiss a complaint as frivolous under section 1915(d) is broader than dismissal under Fed. R. Civil. P. 12. *Montana v. Commissioners Court*, 659 F.2d 17, 21 (5th Cir. 1981), *cert. denied*, 455 U.S. 1026, 102 S.Ct. 1730, 72 L.Ed.2d 147 (1982).

Id., at 741-742.

The Ninth Circuit has held that one of the grounds upon which a complaint may be dismissed as frivolous is "when the complaint fails to state a claim according to Fed. R. Civ. P. 12(b)(6)." *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984) citing *Boag v. Boies*, 455 F.2d 467 (9th Cir. 1972), *cert. denied*, 408 U.S. 926, 92 S.Ct. 2509, 33 L.Ed.2d 388 (1977). In

Anderson v. Coughlin, 700 F.2d 37, 43 (2nd Cir. 1983), the Second Circuit not only approved the notion that the Rule 12(b)(6) standard is a basis for dismissal pursuant to § 1915(d), it instructed their district courts to expand the § 1915 standard beyond the 12(b)(6) standard. Therefore, a complaint could be dismissed even if it stated a claim upon which relief could be granted. Other circuits also agree that a complaint is frivolous pursuant to § 1915(d) if it fails to meet the standards set out in Rule 12(b)(6). *See Malone v. Colyer*, 710 F.2d 258, 261 (6th Cir. 1983); *Martin-Trigona v. Stewart*, 691 F.2d 856, 858 (8th Cir. 1982); *United States ex rel. Walker v. Fayette County, Pennsylvania*, 599 F.2d 573 (3rd Cir. 1979).

This Court has previously held that dismissal of a *pro se* complaint pursuant to Rule 12(b)(6) is appropriate when it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed2d 80 (1957), quoted in *Haines v. Kerner*, 404 U.S. 519, 520-521, 92 S.Ct. 594, 595-596, 30 L.Ed.2d 652 (1972), reaffirmed in *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976). If a *pro se* prisoner's complaint fails to meet this standard, it serves no purpose to grant *in forma pauperis* status and require the filing of a complaint which would not entitled the plaintiff to any relief. To extend this privilege to litigants who can prove no set of facts in support of their claim which would entitle them to relief only abuses the privilege to the detriment of the courts, other *pro se* litigants with valid claims and all possible defendants and their attorneys. Most circuits have prohibited such a practice and this Court should endorse such conduct.

Petitioners conclude that the purposes and intent of 28 U.S.C. § 1915(d) are not fulfilled by requiring a district court to grant pauper status and file a complaint which fails to state a claim. To do so would only require a defendant to file a 12(b)(6) motion and obtain a dismissal. Such a waste of judicial and defendants' resources should not be permitted.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit, and reinstate the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division.

Respectfully submitted,

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Attorneys for Petitioners

RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Should the complaints of indigent plaintiffs be routinely dismissed for failure to state a claim on the court's own motion without any adversary proceedings?

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28 U.S.C. § 1915 (1982). Proceedings in forma pauperis:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceedings, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

Fed. R. Civ. P. 12(b)(6):

> Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . .

STATEMENT OF THE CASE

Respondent concurs in petitioners' Statement of the Case, with the following additions. First, the District Court expressly found that respondent Williams was indigent because he had no credit in his inmate trust account. (J.A. 16-17) Second, the Court of Appeals affirmed the District Court's dismissal of all of respondent's claims under the Fourteenth Amendment and all of his claims under the Eighth Amendment except those against petitioners Neitzke and Choi. *Williams* v. *Faulkner*, 837 F.2d 304, 308-09 (7th Cir. 1988) (J.A. 8-10) Third, upon remand from the Court of Appeals, petitioners moved to dismiss for failure to state a claim. (J.A. 98) Respondent opposed this motion on the merits. (J.A. 95, 105-07) The District Court granted the motion and dismissed the action (J.A. 97-103), but then vacated these orders on the ground that the filing of the petition for certiorari deprived it of jurisdiction. (J.A. 109-10)

SUMMARY OF THE ARGUMENT

The proceedings in the District Court on remand from the Court of Appeals have rendered the question presented to this Court moot. Any decision on this question will have no effect on the outcome of this case. Accordingly, the writ of certiorari should be dismissed as improvidently granted.

Alternatively, the judgment of the Court of Appeals should be affirmed. Congress granted indigents equal access to the federal courts in 28 U.S.C. § 1915 (1982). When a plaintiff proceeds *in forma pauperis* under section 1915, his complaint should be dismissed for failure to state a claim only under the same circumstances and according to the same procedures as the complaint of any other plaintiff. Likewise, his action should be dismissed as frivolous under section 1915(d) only when sanctions could be applied against a paying litigant: only when the action has no rational basis in law or fact. This standard is different from the standard for dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) because it serves a different purpose: to prevent frivolous litigation rather than to resolve a dispositive question of law. In any event, respondent's complaint does state a claim of deliberate indifference to his medical needs under the Eighth Amendment. Finally, as a practical matter, subtle changes in the standard for dismissal of frivolous actions by indigents will not affect the volume of prisoner litigation in the federal courts.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Respondent incorporates by reference his Suggestion of Mootness and Motion to Dismiss the Writ of Certiorari as Improvidently Granted. For the reasons stated therein, the writ of certiorari should be dismissed as improvidently granted.

II. CONGRESS GRANTED INDIGENT LITIGANTS EQUAL ACCESS TO THE FEDERAL COURTS IN 28 U.S.C. § 1915.

Since 1892, section 1915 and its predecessors have allowed litigants to proceed *in forma pauperis* in the

federal courts. The purpose of this statute is plain and it is plainly stated in the report of the House Committee on the Judiciary on the original version of the statute:

> In short, this bill presents the question whether this Government, having established courts to do justice to litigants, will admit the wealthy and deny the poor entrance to them to have their rights adjudicated.

H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1 (1892). In section 1915, Congress did not create two different procedures in federal court, adversary procedures according to the regular rules for those who can afford to pay and ad hoc inquisitorial procedures for those who cannot. It created equal access to the federal courts.

The provision for dismissal of frivolous actions in section 1915(d) does not depart from, but instead follows, the principle of equal access to the federal courts. In determining when leave should be granted to appeal from a criminal conviction, this Court has explicitly equated the standard for frivolousness under section 1915(d) with the standard for dismissal of other appeals for want of a substantial federal question. "The point of equating the test for allowing a pauper's appeal to the test for dismissing paid cases, is to assure equality of consideration for all litigants." *Coppedge* v. *United States*, 369 U.S. 438, 447 (1962). *Accord Ellis* v. *United States*, 356 U.S. 674 (1958) (per curiam); *see Anders* v. *California*, 386 U.S. 738, 744 (1967). Our adversary system of justice is premised on the principle that truth is best discovered and fairness is best served by powerful statements on both sides of a question. *Penson* v. *Ohio*, ___ U.S. ___, ___, 57 U.S.L.W. 4020, 4022 (1988).

The principles of our adversary system apply no less forcefully in civil than in criminal cases. Section 1915 itself

draws no distinction between civil and criminal cases. It applies to "the commencement, prosecution or defense of any suit, action or proceedings, civil or criminal." 28 U.S.C. § 1915(a) (1982). Indeed, Congress amended the statute soon after its enactment to make this clear. Act of June 25, 1910, ch. 435, § 1, 36 Stat. 866.[1] Section 1915 requires that the same standards for permissible pleadings and motions should apply to all litigants in all civil actions. *Adkins* v. *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 343 (1948). Regardless of the many differences between criminal and civil procedure, there is no reason under either system of procedure to favor paying litigants over indigents. The ability to pay fees and costs is not a license to engage in frivolous litigation. *Polk County* v. *Dodson*, 454 U.S. 312, 323 (1981); *Penson* v. *Ohio*, *supra*, ___ U.S. at ___, 57 U.S.L.W. at 4024 (Rehnquist, C.J., dissenting).

In this case, the principle of equal access requires that a dismissal for failure to state a claim follow the procedures specified in Federal Rule of Civil Procedure 12. This means, first, that such a dismissal actually be preceded by a motion; second, that the plaintiff have notice of the motion and the opportunity to oppose it; third, that if the motion is granted, the plaintiff have the the opportunity to amend his complaint; and fourth, and most important, that the motion be considered by a judicial officer who does not, in effect, also act as its proponent.

The record in this case amply illustrates the false economy of attempting to dismiss a complaint for failure to

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[1] This act added the phrase "civil or criminal" to section 1915(a). It also added the provisions in section 1915(a) and (b) for proceeding *in forma pauperis* on appeal, effectively overruling the restrictive interpretation of the original statute in *Bradford* v. *Southern Railway*, 195 U.S. 243 (1904).

state a claim without adversary proceedings. A proper motion to dismiss for failure to state a claim could have been expeditiously granted or denied by a single judge in the District Court. The premature dismissal in this case has instead required the continued attention of the parties, their attorneys, three judges on the Court of Appeals, and now the nine justices of this Court. Indeed, because the District Court dismissed the case before process was served, it just postponed the adversary proceedings until the case reached the Court of Appeals, with attendant difficulties in notifying the defendants of the action against them and the stage that the proceedings had reached in their absence. As the Court of Appeals recognized, the procedure followed by the District Court is just another example of how judicial haste makes waste. *Williams* v. *Faulkner*, 837 F.2d 304, 307 (7th Cir. 1988) (J.A. 6). *Accord Bayron* v. *Trudeau*, 702 F.2d 43, 46 (2d Cir. 1983).

Petitioners are state officials who are now represented by the Attorney General of Indiana. They did not need the assistance of the District Court in moving to dismiss Williams' *pro se* complaint. Moreover, Williams was entitled to notice of any such motion and an opportunity to respond to it. All motions must be served upon opposing parties, Fed. R. Civ. P. 5(a), and must be heard and determined at a preliminary hearing, or on equivalent written presentations, on application of any party. Fed. R. Civ. P. 12(d). The complaint itself cannot contain legal argument, but only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Moreover, if the motion is granted, the plaintiff has the right to amend his complaint if no responsive pleading has been filed or to seek leave to amend, which leave "shall be freely given when justice so

requires." Fed. R. Civ. P. 15(a); *Foman* v. *Davis*, 371 U.S. 178, 182 (1962).

Most fundamentally, Williams was entitled to an appraisal of his complaint by a federal judge who had not also raised the question of its sufficiency. A premature decision on the merits, without the benefit of adversary proceedings, is likely to draw even the best of judges into error. "Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation." *Bounds* v. *Smith*, 430 U.S. 817, 826 (1977). The District Court's attempt to afford Williams some semblance of the procedures he would have had on a motion to dismiss created further inefficiencies. The District Court construed Williams' motion to vacate judgment under Rule 59(e), a motion which is not liberally granted, as if it were a requst for leave to amend the complaint under Rule 15(a), which is. (J.A. 23) Such a distorted interpretation of the Federal Rules of Civil Procedure was an attempt to give Williams the process which is his due, but it would not have been necessary at all if the District Court had determined the sufficiency of the complaint according to the ordinary procedures under Rule 12.

Far from being an adequate substitute for an adversary presentation of the issues, the procedure followed in this case illustrates the defects of a premature decision on the sufficiency of the complaint. A motion to vacate comes only after the District Court has already made up its mind that the complaint is insufficient. The initial order of dismissal may not be accompanied by an opinion which gives notice of the defects in the complaint. Fed. R. Civ. P. 52(a). But even if it is, judges are much less likely to vacate an initial decision, essentially on rehearing, than to render a different decision in the first place. Especially in

prisoners' cases, adherence to the Federal Rules of Civil Procedure should counteract, instead of aggravate, any tendency toward premature dismissal.[2]

The preliminary determination whether a complaint should be dismissed as frivolous under section 1915(d) does not require wholesale modification of the Federal Rules of Civil Procedures. In a widely cited study commissioned by the Federal Judicial Center, a committee of federal judges and magistrates recommended a set of procedures to be followed in dismissal of prisoners' complaints under section 1915(d). Prisoner's Civil Rights Committee, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts (Federal Judicial Center 1980). They recommended that dismissal be preceded by a show cause order identifying the defects in the complaint and allowing the plaintiff an opportunity to respond or to amend. *Id.* at 59-60. The plaintiff should be denied an opportunity to respond only if the complaint is "irreparably frivolous or malicious." *Id.* at 59-60, 63. They also recommended that doubts should be resolved against dismissal: "In borderline cases, the court should not dismiss, but should let the case proceed and rule on a subsequent motion to dismiss if one is presented." *Id.* at 60 (footnote omitted).

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[2] As the Third Circuit has said in reversing the dismissal of a prisoner's complaint as frivolous:

> While we recognize that appellant's complaint contains many standard objections to the prison system, we agree with the fifth circuit that "a judge cannot allow the personal view that the allegations of a pro se complaint are implausible to temper his duty to appraise suit pleadings liberally." *Slavin* v. *Curry*, 574 F.2d 1256, 1260 (5th Cir. 1978).

Weaver v. *Wilcox*, 650 F.2d 22, 26 (3d Cir. 1981). *Accord Franklin* v. *Murphy*, 745 F.2d 1221, 1229 (9th Cir. 1984).

This is precisely what the Court of Appeals required in this case. "In a close case, the court should permit the claim to proceed at least to the point where responsive pleadings are required." *Williams* v. *Faulkner, supra*, 837 F.2d at 307 (J.A. 6). Other circuits have reached the same conclusion.[3] When all that is at stake is the cost of service of process and the filing of a motion to dismiss for failure to state a claim, section 1915 requires judges to resolve doubts in favor of indigents seeking access to the federal courts. The Court of Appeals did no more than that in this case. It affirmed the dismissal of all of Williams' claims under the Fourteenth Amendment and most of his claims, those against three of five defendants, under the Eighth Amendment, *Id.* at 308-09 (J.A. 8-10). Only his claims against petitioners Neitzke and Choi were close enough to be remanded to the District Court. Just like a paying litigant, Williams was entitled to an adversary decision on these claims.

III. DISMISSAL OF FRIVOLOUS COMPLAINTS SERVES A DIFFERENT PURPOSE AND SHOULD BE JUDGED BY A DIFFERENT STANDARD THAN DISMISSAL FOR FAILURE TO STATE A CLAIM.

Dismissal under section 1915(d), like other sanctions, is designed to prevent litigation which needlessly burdens opposing litigants and the judicial system. Indeed, section 1915(e) refers to provisions for imposing costs "as in other cases," including provisions for costs and attorney's

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[3] *Johnson* v. *Silvers*, 742 F.2d 823, 825 n.20 (4th Cir. 1984); *Brandon* v. *District of Columbia Board of Parole*, 734 F.2d 56, 62 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985); *Bayron* v. *Trudeau*, 702 F.2d 43, 45 (2d Cir. 1983); *see Wiggins* v. *New Mexico State Supreme Court Clerk*, 664 F.2d 812, 817-18 (10th Cir. 1981), *cert. denied*, 459 U.S. 840 (1982).

fees as a sanction for vexatious litigation. *E.g.*, 42 U.S.C. § 1988 (1982); Fed. R. Civ. P. 11; Comment, Controlling and Deterring Frivolous In Forma Pauperis Complaints, 55 Ford. L. Rev. 1165, 1187-90 (1987). Because section 1915 grants the poor equal access to the federal courts, its provisions for dismissal of frivolous actions should be interpreted like other sanctions for frivolous litigation. Section 1915(d) differs from these provisions only in allowing dismissal of frivolous actions before they impose burdens upon opposing litigants and the judicial system. It does so for the obvious reason that sanctions against indigent litigants, even though authorized by section 1915(e), are less likely to be effective than sanctions against paying litigants.

This difference in timing, however, should not alter the standard of frivolousness. As this Court has cautioned, the standard for awarding attorney's fees against paying litigants should not be applied on the basis of hindsight. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). Likewise, the standard for determining whether an action should be dismissed as frivolous should not be harder on indigent litigants just because it is applied earlier. It should be the same as the standard for frivolousness in civil actions generally. Thus, Rule 11 requires all pleadings and motions in the federal district courts to be preceded by a reasonable inquiry into the factual and legal basis for the position taken by the attorney or party signing the document.[4] Likewise, attorney's fees may be

[4] Rule 11 provides in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

awarded against a civil rights plaintiff, like respondent, for violation of a similar standard of reasonableness:

> In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was *frivolous, unreasonable, or without foundation*, even though not brought in subjective bad faith.

Christiansburg Garment, supra, 434 U.S. at 421 (emphasis added). *See Hensley* v. *Eckerhart*, 461 U.S. 424, 429 n.2, 433 n.7 (1983). The Court of Appeals applied essentially the same standard in this case:

> Under § 1915(d), in contrast, an *in forma pauperis, pro se* complaint can be dismissed *sua sponte* by the district court only if the petitioner cannot make any rational argument in law or fact which would entitle him or her to relief.

Williams v. *Faulkner*, 837 F.2d 304, 307 (7th Cir. 1988) (J.A. 5).

Dismissal for failure to state a claim under Rule 12(b)(6) serves a very different purpose from any provision for dismissal of or sanctions against frivolous litigation. It is designed to dispense with needless discovery and fact-finding when the plaintiff has failed to allege any facts which would, if found, entitle him to relief. As every lawyer knows, a motion to dismiss for failure to state a claim raises a pure question of law: whether, assuming the factual allegations in the complaint to be true, the plaintiff is entitled to any recovery at all against the defendant. *Cooper* v. *Pate*, 378 U.S. 546 (1964) (per curiam). It is apparent, even on the most cursory examination, that this question of law often is not frivolous. This Court itself has decided many important questions, and many important questions of civil rights law, that arose in just this way. *E.g.*, *Patsy* v. *Florida Board of Regents*, 457 U.S. 496,

498-99 (1982); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 277-78 (1976); *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 389-90 (1971); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968); *Monroe* v. *Pape*, 365 U.S. 167, 170 (1961). Some of these decisions have involved claims under the Eighth Amendment, just like this case. *E.g.*, *Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 241 (1983); *Estelle* v. *Gamble*, 429 U.S. 97 (1976). A question of law that is worthy of this Court's attention cannot be frivolous. There is no general equivalence between dismissal for failure to state a claim and dismissal for frivolousness.

The only general relationship between these two kinds of dismissals is that recognized by the Court of Appeals: a complaint should be dismissed as frivolous when no rational agument of law or fact can be advanced against a motion to dismiss for failure to state a claim. It would serve no purpose for this Court to go further and compare the standards under section 1915(d) and under Rule 12(b)(6) in detail. It would prove to be as fruitless—and as confusing to the lower federal courts—as a comparison between the standards for imposing sanctions against paying litigants, for instance, under Rule 11, and the standard for dismissal under Rule 12(b)(6). Just as every complaint that fails to state a claim does not trigger sanctions under Rule 11, so too, every such complaint does not require dismissal under section 1915(d). *See* Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 214-17 (1988). Indeed, this Court has already held that a prisoner's complaint was properly dismissed for failure to state a claim, but that attorney's fees were not properly awarded against him under 42 U.S.C. § 1988 (1982). *Hughes* v. *Rowe*, 449 U.S. 5, 9-16 (1980) (per curiam).

Section 1915(d) cannot be equated with Rule 12(b)(6) for other reasons as well. Like other provisions designed

to deter frivolous litigation, section 1915(d) must be given a flexible interpretation. The discretionary language, both of subsection (a) and subsection (d) of the statute and the reference to "malicious" actions in subsection (d), authorize the District Court to take account of factors not properly considered on a motion under Rule 12(b)(6). As several lower federal courts have held, and as some of the justices of this Court have suggested, a district court may take judicial notice of the plaintiff's tendency to engage in repetitive and harassing litigation. *Boag* v. *MacDougall*, 454 U.S. 364, 365 n.* (1982); *id.* at 366 (O'Connor, J., concurring); *id.* at 368-69 (Rehnquist, J., dissenting); *Franklin* v. *Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984) (citing cases). In this respect, section 1915(d) simply reflects the standards applied to paying litigants. Again, under Rule 11, sanctions can be imposed upon a plaintiff even if his complaint succeeds in stating a claim. *See* Vairo, *supra*, 118 F.R.D. at 218-19. An exhaustive comparison between these provisions and Rule 12(b)(6) would amount to nothing more than a confusing distraction.

Of course, some formulations of the standards under section 1915(d) and under Rule 12(b)(6) make them appear to be almost identical. In particular, the standard for evaluating *pro se* complaints, whether or not the plaintiff proceeds *in forma pauperis*, appears to be quite similar to the standard adopted by the Court of Appeals:

> Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Hughes v. *Rowe*, 449 U.S. 5, 10 (1980) (per curiam). *Accord Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); *Haines* v. *Kerner*, 404 U.S. 519, 520-21 (1972); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The two standards differ, how-

ever, in one important respect. Rule 12(b)(6) requires the court to resolve all doubts about the *factual allegations* of the complaint in favor of the plaintiff. Section 1915(d), as interpreted by the Court of Appeals, also requires the court to resolve all genuine doubts about the *legal theory* of the complaint in favor of the plaintiff. This difference corresponds, in turn, to the different functions performed by these standards. Rule 12(b)(6) prevents needless discovery and factfinding because, even if the plaintiff proves all the allegations of the complaint, the law will deny him relief. Section 1915(d) prevents needless litigation altogether, and in particular, a dismissal for frivolousness forecloses an adversary examination of the sufficiency of the complaint.

Much of the conflict that petitioners find in the decisions of the circuits just amounts to varying verbal formulations of these standards. These varying formulations reflect the flexibility required by section 1915(d). Abstract standards cannot perfectly capture all the different circumstances in which an action may be found to be frivolous, as this Court has recognized. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 421 (1978). It should come as no surprise that different formulations can be found in different opinions, often within the same circuit. Indeed, different formulations can often be found within a single opinion. At least seven circuits have endorsed standards for frivolousness that closely resemble the standard followed by the Seventh Circuit.[5] Some of these circuits

[5] *Bayron* v. *Trudeau* 702 F.3d 43, 45 (2d Cir. 1983) ("[S]ua sponte dismissal of a pro se prisoner petition is strongly disfavored."); *United States ex rel. Walker* v. *Fayette County*, 599 F.2d 573, 575 (3d Cir. 1979) (per curiam) ("[A] matter is not frivolous if 'any of the legal points [are] arguable on their merits.'"); *Johnson* v. *Silvers*, 742 F.2d 823, 824 (4th Cir. 1984) ("[A] district court may not dismiss a claim under § 1915(d) unless it finds that the plaintiff would not be entitled

seem to have equated these standards with the standard for dismissal for failure to state a claim.[6] Some have also allowed dismissal for frivolousness even when the complaint does state a claim.[7] Apart from these circuits, two others have allowed dismissal for frivolousness only when the complaint fails to state a claim[8] and another has allowed dismissal for frivolousness in other circumstances as well.[9] In the absence of a perfect rule, it is difficult to

to relief '"beyond doubt" and under any arguable construction, "both in law and in fact."'"); *Payne* v. *Lynaugh*, 843 F.2d 177, 178 (5th Cir. 1988) ("[I]t is not clear that [the plaintiff] can prove no set of facts in support of his claim, that his claim has no arguable basis in law and fact or that the claim's realistic chance of success is slight."); *Franklin* v. *Murphy*, 745 F.2d 1221, 1225 (9th Cir. 1984) ("We also define a frivolous action under § 1915(d) as an action lacking arguable basis in law or in fact."); *Wiggins* v. *New Mexico State Supreme Court Clerk*, 664 F.2d 812, 815 (10th Cir. 1981), *cert. denied*, 459 U.S. 840 (1982) ("The test of legal frivolity is whether a plaintiff can make a rational argument on the law and facts in support of his claim."); *Brandon* v. *District of Columbia Board of Parole*, 734 F.2d 56, 59 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985) ("Dismissal of *pro se* suits under the frivolous standard must therefore be reserved for those cases in which there is indisputably absent any factual and legal basis for the asserted wrong.").

[6] *Bayron* v. *Trudeau*, 702 F.2d 43, 45 (2d Cir. 1983); *United States ex rel. Walker* v. *Fayette County*, 599 F.2d 573, 575 (3d Cir. 1979); *Payne* v. *Lynaugh*, 843 F.2d 177, 178 (5th Cir. 1988); *Franklin* v. *Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984).

[7] *Payne* v. *Lynaugh*, 843 F.2d 177, 178 (5th Cir. 1988); *Franklin* v. *Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984).

[8] *Malone* v. *Colyer*, 710 F.2d 258, 260 (6th Cir. 1983); *Haley* v. *Dormire*, 845 F.2d 1488, 1490 (8th Cir. 1988).

[9] *Harris* v. *Menendez*, 817 F.2d 737, 740-741 (11th Cir. 1987).

Defendants also list the Second Circuit as a circuit that takes this stricter approach, citing *Anderson* v. *Coughlin*, 700 F.2d 37 (2d Cir. 1983). In addition to the fact no opinion in that case received more

improve upon the standard formulated by the Seventh Circuit in this case: a complaint should be dismissed as frivolous "only if the petitioner cannot make any rational argument in law or fact which would entitle him or her to relief." *Williams* v. *Faulkner*, 837 F.2d 304, 307 (7th Cir. 1988) (J.A. 5).

Instead of acknowledging the difference in purpose between dismissals for frivolousness and dismissals for failure to state a claim, petitioners propose to run the two standards together. They propose a procedure which invites the federal courts to put the cart before the horse: to first guess that a motion to dismiss for failure to state a claim would be granted after adversary proceedings and then to dismiss the action as frivolous *sua sponte*. This procedure makes sense only when, as the Court of Appeals held, there is no doubt that the complaint fails to state a claim. In any other circumstances, it invites the federal courts to make a premature guess about the ultimate outcome of litigation. There is no basis in section 1915 for this strange procedure. Except in cases clearly lacking in merit, section 1915 requires the federal courts to do what they have traditionally done: render a considered decision based on an adversary presentation of the issues.

IV. THE COMPLAINT STATED A CLAIM UNDER THE EIGHTH AMENDMENT FOR DELIBERATE INDIFFERENCE TO WILLIAMS' MEDICAL NEEDS.

Petitioners contend that the Court of Appeals has already decided that Williams' complaint fails to state a

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than a single vote, this decision did not concern dismissal of a complaint *sua sponte*, but only after the defendants had filed a motion to dismiss for failure to state a claim. *Id.* at 39-40. The rule in the Second Circuit is that dismissal of a complaint *sua sponte* is "strongly disfavored." *Bayron* v. *Trudeau*, 702 F.2d 43, 45 (2d Cir. 1983).

claim. All the Court of Appeals said, in a dictum unnecessary to its decision, was that the complaint failed "to *demonstrate* the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6)." *Williams* v. *Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988) (J.A. 7) (emphasis added). In the very next sentence, it added an immediate qualification:

> Williams' complaint, however, is not frivolous within the meaning of 28 U.S.C. § 1915(d) because we cannot state with certainty that Williams is unable to make any rational argument in law or fact to support his claim for relief.

Id. (J.A. 7). Respondent, of course, disagrees with the dictum of the Court of Appeals, but even taking it at face value, it can be reconciled with the immediately following statement. Both statements can consistently be read together to express some doubt whether the complaint should be dismissed and to allow an amendment to the complaint to rectify its deficiencies. Even if the complaint fails to "demonstrate" a claim under the Eighth Amendment, there may be some doubt whether it states a claim or whether it might be amended to do so.

If the Court of Appeals had resolved all doubts about the adequacy of the complaint, then it would have dismissed all, not just some, of Williams' claims, and all for the same reason: because he could no longer have made any rational argument in law or fact in their support. The fact that the Court of Appeals did not reach this conclusion is the strongest evidence that it continued to have doubts about the sufficiency of Williams' complaint. The Court of Appeals did not resolve these doubts in the first of the quoted statements and then resurrect them in the second. Instead, the Court of Appeals left them to be

resolved by the District Court after adversary proceedings on remand.

On a properly presented motion to dismiss for failure to state a claim, these doubts should be resolved in favor of the sufficiency of Williams' complaint. Since petitioners have now filed their answer, on remand from the Court of Appeals, the record makes clear what the dispute in this case is all about. It is almost entirely over factual issues: whether Williams was diagnosed as having a brain tumor that caused him to lose his balance; whether medical personnel directed that he be relieved of work that required him to climb up and down stairs; whether he was required to do such work despite this medical diagnosis and directive; and whether he has been exposed to serious injury from falling down the stairs. The allegations on these issues amount, almost literally, to a claim of "deliberate indifference to serious medical needs," sufficient to state a claim under the Eighth Amendment. *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976).

Both the original complaint (J.A. 34-36) and the amended complaint (J.A. 77-78, 79-80) contain specific allegations on all but the last of these issues. Petitioners admit some of these allegations and deny others. The plainly factual disputes that remain cannot be resolved before summary judgment. In particular, Williams alleges that he has a small tumor in the pineal region of his brain and that he suffers from dizziness. (J.A. 34, 77-78). Petitioners deny that he has a brain tumor, but admit that he suffers from seizures. Answer ¶4(b), (c), (e) (J.A. 86-87). Williams alleges that a physician's assistant directed that he be relieved from any work that required him to climb up or down stairs. (J.A. 35-36, 77) He also attached two memoranda as exhibits to his complaint on this issue. Complaint Exhs. A, C, (J.A. 42, 43). These

memoranda state, in no uncertain terms, that he was to be relieved of work for one year[10] and that "[i]t is very likely that he will have this condition for some time to come." Exh. A (J.A. 42). Petitioners admit that defendant Choi signed such a directive. Answer ¶4(d) (J.A. 87). Williams alleges that, despite this diagnosis and directive, he was assigned to work that required him to go up and down three flights of stairs. (J.A. 36, 79-80) Petitioners deny this allegation for lack of information and belief. Answer ¶4(f) (J.A. 87).

Williams does not allege specifically that he would suffer serious injuries if he fell down the stairs. The District Court has now twice stated that this omission was fatal to his complaint because he failed to allege that he had "serious medical needs" that went unmet. (J.A. 19, 102) Such an allegation, however, is hardly necessary under the liberal standards endorsed by this Court for evaluating *pro se* complaints. To repeat:

> Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Hughes v. *Rowe*, 449 U.S. 5 (1980). *Accord Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); *Haines* v. *Kerner*, 404 U.S. 519, 520-21 (1972); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Whether the risk of injury on the prison stairs amounts to a serious medical need requires an examination of the evidence: how bad Williams' condition was, how steep the stairs were, whether Williams would

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[10] Any stupid idiot who can read should be able to figure out that a person who has a small brain tumor and history of cardiac arrhythmias and has this documented needs to be on the first floor.
Exh. C (J.A. 43).

have been protected by guard rails. To be sure, this is not a question of general significance, but that is precisely why it is a question of fact which can only be resolved after evidence has been submitted, not on the pleadings alone.

Unlike other cases in which prisoners alleged violations of the Eighth or Fourteenth Amendments Williams does not allege simple negligence on behalf of prison officials, *Daniels* v. *Williams*, 474 U.S. 327, 330-31 (1986); *Davidson* v. *Cannon*, 474 U.S. 344, 347-48 (1986), or inadequate medical treatment despite repeated instances of medical attention. *Estelle* v. *Gamble*, 429 U.S. 97, 107-08 (1976). Instead, he alleges that prison officials showed reckless disregard for a medical diagnosis and directive by assigning him to work which might cause him serious injury. The most that can be said against this claim is what petitioners already allege in their answer: that Williams was tested for a brain tumor and none was found. Answer ¶ 4(e) (J.A. 87). Although Williams was not required to do so, Fed. Re. Civ. P. 7(d), he specifically denies that any such test was performed. (J.A. 37, 78) This is exactly the kind of factual dispute which can quickly be resolved on summary judgment after Williams' medical records have been produced in discovery. Dismissal of Williams' complaint would only transform a simple question of fact into a difficult question of law and add to the wasteful litigation that has already occurred in this case.

V. THERE ARE BETTER WAYS TO DISCOURGE FRIVOLOUS LITIGATION BY STATE PRISONERS THAN BY SUBTLE VARIATION IN THE STANDARDS FOR DISMISSAL OF FRIVOLOUS CLAIMS.

A reinterpretation of section 1915(d) is not the right vehicle for addressing the special problems of prisoner litigation. First, any such interpretation will be too broad because it must extend beyond prisoners to all indigents

who seek access to the federal courts through section 1915(d). Second, it will also be too narrow because it will not deter prisoners from bringing claims that are not likely to succeed on the merits. As we have seen, the courts of appeals do not always carefully distinguish between dismissal of frivolous actions under section 1915 and dismissal under Rule 12(b)(6). *See* notes 5-9 *supra*. If sophisticated federal judges have trouble drawing this distinction, it is certain to be entirely lost on state prisoners who engage in *pro se* litigation.

Only a drastic increase in the standard which their complaints must meet, far more than any tenable interpretation of section 1915 would permit, is likely to have any effect at all on the number of claims filed by state prisoners in federal court. Few of these claims result in an award of final relief on the merits. Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 624 (1979). Whether this situation requires reform of the remedies available to state prisoners is an urgent question of policy. It is, however, a question for Congress. As yet, Congress has not generally required exhaustion of administrative remedies under section 1983 and it has not required exhaustion of administrative remedies by state prisoners except in narrowly defined conditions. 42 U.S.C. § 1997e (1982); *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 507-12 (1982). This Court cannot close the door of the federal courthouse by adopting an exacting standard of frivolousness under section 1915(d) when Congress has determined to leave the door open under section 1983.

A far more promising means of deterring prisoners from bringing meritless claims is to require them to pay a proportionate share of the fees and costs normally required of litigants in federal court. Several circuits have

approved the partial payment of fees and costs as an exercise of discretion under section 1915(a). *E.g.*, *Jones* v. *Zimmerman*, 752 F2d 76, 78-79 (3d Cir. 1985); *Evans* v. *Croom*, 650 F.2d 521 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982); Comment, Controlling and Deterring Frivolous In Forma Pauperis Complaints, 55 Ford. L. Rev. 1165, 1181-85 (1987) (citing cases). As these cases illustrate, many prisoners earn small amounts of money whose expenditure in litigation they can appreciate far more readily than any subtle change in the standard of frivolousness under section 1915(d). Much depends, of course, on how much an indigent plaintiff is required to pay, but any requirement that forces indigents to face the same incentives as paying litigants fulfills the congressional purpose in section 1915 of providing equal access to the federal courts. Whether partial payment of filing fees can also reduce the volume of prisoner litigation in the federal courts remains a matter of continuing empirical investigation. T. Willging, Partial Payment of Filing Fees in Prisoner In Forma Pauperis Cases in Federal Courts: A Preliminary Report viii, 19-23 (Federal Judicial Center 1984). The vexing problems of prisoner litigation may be solved only by establishing administrative procedures under section 1997e or by a general improvement in the conditions of confinement in state prisons. Whatever the merits of these proposals, they are far more likely to succeed than costly litigation over a "separate but equal" system of procedure for indigent litigants in federal court.

CONCLUSION

For the reasons stated in his Suggestion of Mootness and Motion to Dismiss the Writ of Certiorari as Improvidently Granted, respondent urges this Court to dismiss the writ of certiorari as improvidently granted. Alternatively, for the foregoing reasons stated in this brief, respondent urges this Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfuly submitted,

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REPLY

BRIEF

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No. 87-1882

IN THE

Supreme Court of the United States

October Term, 1988

DEAN NEITZKE, Individually and in his official capacity as Administrator of the Infirmary, Indiana Reformatory, and DR. HAN CHUL CHOI, Individually and in his official capacity as Medical Director, Indiana State Reformatory,

Petitioners,

v.

HARRY LAWRENCE WILLIAMS, SR.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

A COMPLAINT WHICH FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO 42 U.S.C. § 1983 IS FRIVOLOUS WITHIN THE MEANING OF 28 U.S.C. § 1915(d)

A *pro se* prisoner's complaint and all pleadings must be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). A district court judge who considers whether to dismiss a complaint under Rule 12(b)(6) for failure to state a claim must accept the allegations in the complaint as true. *Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964). The district court may then dismiss the *pro se* complaint pursuant to Rule 12(b)(6) when it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957), quoted in *Haines v. Kerner*, 404 U.S. 519, 520-521, 92 S.Ct. 594, 595-596, 30 L.Ed.2d 652 (1972), reaffirmed in *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976).

Once a district court has applied this analysis to a *pro se* complaint and finds that it fails to state a claim, it serves no purpose to grant pauper status and acquire participation in the legal process by defendants such as the instant Petitioners irrespective of whether they have legal representation available through state or local governments.

28 U.S.C. § 1915 simply provides that no citizen shall be denied an opportunity to commence a civil action solely because his poverty makes it impossible for him to secure or pay the costs. *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S 331, 342, 69 S.Ct. 85, 90, 93 L.Ed. 43 (1948). It does not, as Respondent suggests, require that an indigent complainant be entitled to identical judicial procedures as that of a paying litigant. Congress imposed the additional requirement upon pauper litigants that their complaints could be dismissed prior to service upon a defendant pursuant to Section 1915 if the court is satisfied that a claim is frivolous or malicious. 28 U.S.C. § 1915(d). Furthermore, this determination should be made prior to the issuance of process to spare the prospective defendant of the expense and inconvenience of answering such complaints. See, "Recommended Procedures of Handling Prisoner Civil Rights Cases in the Federal Court", Federal Judicial

Center, Tentative Report No. 2, 1977, Commentary following Standard D.

Petitioners do not seek to solve the problems inherent in *pro se* prisoner litigation as a result of the arguments made in this proceeding as suggested by Respondent. Rather, it is simply argued that a *pro se* complaint, when judged by the standards described above, should at least state a cognizable claim before pauper status is granted pursuant to Section 1915. If it appears that the plaintiff can prove no set of facts in support of his claim which entitles him to relief, his complaint must be dismissed pursuant to Rule 12(b)(6) anyway. *Conley v. Gibson*, 335 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). To require that a district court grant pauper status and delay this determination until after service of process and a defendant's response only delays the inevitable to the detriment of all possible defendants, the courts and all *pro se* litigants with meritorious claims.

Respondent suggests that the sanctions available in Rule 11 adequately protect the courts and defendants. However, this argument ingores the realities of the situation. The sanctions available pursuant to Rule 11 and 42 U.S.C. § 1988 only act as a deterrent to paying litigants because of the possibility of the imposition of monetary sanctions. The very purpose of Section 1915 is to provide access to the courts to those otherwise unable to pay the costs associated with litigation. To argue that the imposition of monetary sanctions against indigent individuals will deter frivolous litigation is ludicrous. As the Fifth Circuit recognized:

> Unlike most litigants, prisoners have everything to gain and nothing to lose by filing frivolous lawsuits. Filing a suit *in forma pauperis* costs a prisoner little or nothing; time is usually of little importance to a prisoner and prisoners are not often deterred by the threat of possible sanctions for malicious or frivolous actions or perjury. Moreover, a prisoner, while he may be unsuccessful, can at least look to a "short sabbatical in the nearest federal courthouse." *Cruz v. Beto*, 405 U.S. 319, 327, 92 S.Ct.

> 1079, 1084, 31 L.Ed.2d 263, 271 (1972) (Rehnquist, J., dissenting). Thus, the temptations to file frivolous or malicious suits is strong, and these suits clutter up the federal courts, wasting scarce and valuable resources, subjecting prison officials unnecessarily to the burdens of prison litigation and preventing prisoner suits with merit form receiving adequate attention.

Green v. McKaskle, 788 F.2d 1116, 1119-1120 (5th Cir. 1986).

Similarly, the Eleventh Circuit replied to this argument as follows:

> The reasons for granting broader discretion in IFP suits than in ordinary civil actions are compelling. Person proceeding IFP do not face the same financial obstacles as other litigants. IFP petitioners not only are exempt from customary court costs, but because of their poverty are practically immune from the financial deterrents to filing frivolous lawsuits, such as assignment of costs of the suit and tort liability for abuse of process. This immunity increases the temptation to file complaints which are factually unprovable or legally questionable. *Green v. City of Montezuma*, 650 F.2d 648, 651 (5th Cir. Unit B 1981)[1]; *see also, Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984). No one should be allowed to misuse the courts with impunity. Certainly, nothing in section 1915 requires taxpayers to subsidize misuse of the courts.

Harris v. Menendez, 817 F.2d 737, 738-739, (11th Cir. 1987).

Respondent further argues that his complaint does state a claim and that both the District Court and the Seventh Circuit erred by finding that the complaint failed "to demonstrate the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6)." *Williams v. Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988) (J.A. 13). The determination of whether the courts below accurately determined this issue has not been raised herein. Petitioner's appeal is based upon an inappropriate standard applied by the Seventh Circuit, not the correctness of the Seventh Circuit's analysis of the complaint.

The Defendant-Petitioners herein are Dean Neitzke, the Administrator of the Infirmary at the Indiana Reformatory, and Dr. Han Chul Choi, the Medical Director of the Indiana Reformatory (J.A. 40). Plaintiff-Respondent's complaint and the attachments thereto conclusively show the lack of deliberate indifference on the part of the Defendant- Petitioners. Williams clearly states his claim in the notice of tort claim which is attached to his complaint (J.A. 54-65). Williams admits that he "has been treated by Dr. Han Choi for a seizure disorder" (J.A. 57). After Williams had problems with his equilibrium, he "was placed in the infirmary" (J.A. 57). He also states that "at the present time the medical personnel continue to treat the seizure disorder. . ." (J.A. 58). Williams concludes this statement by alleging malpractice of the State's physicians (J.A. 58). Attached to the tort claim notice is an order signed by Defendant-Petitioner, Dr. Han Chul Choi, informing prison officials that Williams "should be assigned to a work assignment that does not require going up and down stairs, due to medical reasons" (J.A. 65).

It is clear that Defendant-Petitioner, Choi, and his supervisor, Neitzke, were rendering medical treatment to Williams and issuing orders to prison officials concerning William's medical problems and his work assignments. All of the statements made by Williams indicate that he is receiving medical care and attention, but that he is unhappy with the type or quality of care provided and the reaction of prison officials to the recommendations of Dr. Choi. At most, a negligence or malpractice claim has been stated against the instant Petitioners. However, as the Seventh Circuit found, the complaint fails to demonstrate the level of deliberate indifference necessary to survive a motion to dismiss under Rule 12(b)(6). *See, Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 257 (1976).

Petitioners submit that the actions taken by the District Court herein should be encouraged. Identical conduct by district courts in other circuits is required. The District Court herein reviewed the complaint pursuant to § 1915 (d), found that no claim had been stated and issued an order explaining its

decision (J.A. 19-28). Once informed of the deficiencies in the complaint, the *pro se* Plaintiff was allowed an opportunity to amend his complaint and it still failed to state a claim (J.A. 29-32). *In forma pauperis* status is a privilege. To extend this privilege to litigants who cannot state a claim only abuses this privilege to the detriment of the courts, other *pro se* litigants with valid claims and all possible defendants and their attorneys. The District Court's decision was proper and should be affirmed by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit and reinstate the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division.

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